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UNITED STATES DISTRICT COURT

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WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA

CIVIL ACTION

NO. 09-CR-00232

VERSUS

JUDGE DEE D. DRELL

JEREMY BENDER

MAGISTRATE JUDGE JAMES D. KIRK

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Before the court is a motion to vacate, set aside, or correct sentence filed pursuant to 28 U.S.C. § 2255 by Jeremy Bender ("Bender") on May 20, 2013 (Doc. 102). Bender is challenging his July 2010 conviction pursuant to a guilty plea in the Western District of Louisiana, Alexandria Division, on one count of assault with a dangerous weapon (Doc. 35). Bender was sentenced in March 2011, as career offender, to 77 months imprisonment (Docs. 75, 76). Bender's conviction and sentence were affirmed on appeal (Doc. 97). U.S. v. Bender, 516 Fed.Appx. 289 (5th Cir. 2012). Bender is presently confined in the United States Penitentiary in Coleman, Florida.

Bender raises the following grounds for relief in his Section 2255 motion:

1. Ineffective assistance of counsel for failure to properly investigate the specific manner in which Bender was initially charged in all of his prior state convictions (some charges were as a juvenile by the State of Maine, Maine Youth Center) which allowed the court to wrongly classify and sentence Bender as a career criminal.

2. Ineffective assistance of counsel for failure to inform Bender of each standard that needs to be met to claim self defense. Had defense counsel properly informed Bender, he would have known he met those standards and would have proceeded to trial.

3. Ineffective assistance of counsel for failure to obtain the actual hospital reports on the two victims to show whether they were actually injured and the exact extent of their injuries.

4. Ineffective assistance of counsel for defense counsel's failure to interview any defense witnesses, including the victims, which would have shown Bender was defending himself. Bender gave defense counsel a list of thirty people who would be positive witnesses for Bender, but he did not contact any of them. Bender obtained about ten affidavits himself.

5. Ineffective assistance of counsel for defense counsel's failure to secure discovery material, FBI reports, criminal records of everyone involved, institutional reports of the assault, hospital records, etc.

6. Ineffective assistance of counsel for defense counsel's failure to provide clear pictures of the incident for evidence.

7. Ineffective assistance of counsel for defense counsel's failure to properly question the FBI agent who testified at Bender's guilty plea proceeding.

The United States responded to Bender's motion (Doc. 113).

The motion is now before the undersigned Magistrate Judge for

initial review. See 28 U.S.C. § 2255 and Rule 4(b) of the Federal Rules Governing Section 2255 Proceedings For the United States District Courts, which states in part, "If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate."

Rule 8(a) Resolution

This court is able to resolve the merits of this Section 2255 application without the necessity of an evidentiary hearing because there is no genuine issue of material fact that is relevant to the claims of the petitioner, and the State court records provide the required and adequate factual basis necessary to the resolution of the Section 2255 application. U.S. v. Green, 882 F.2d. 999, 1008 (5th Cir. 1989); Section 2255 Rule 8(a).

Facts

The facts of this case, as set forth by the U.S. Fifth Circuit Court of Appeals in U.S. v. Bender, 516 Fed.Appx. at 290, are as follows:

"On October 29, 2008, Bender, then an inmate at the

United States Penitentiary in Pollack, Louisiana, was involved in a four-person physical altercation in a cell occupied by inmates Russell Harmon and Andrew Dickerson. Exactly what precipitated this confrontation was the subject of conflicting evidence during Bender's plea hearing and two sentencing hearings.

"Bender gave the following account during his second sentencing hearing. On October 27, Bender and several other inmates told Harmon that he was not welcome among the general population of the prison because he was a child molester. Two days later, Rhyen Driggans, another inmate, told Bender that Harmon wanted to speak with him.¹ Accordingly, Bender, accompanied by inmate Stephen Brum, went to the prison unit in which Harmon's cell was located, passed through a metal detector, and explained to an inquiring officer that they were there to speak with Harmon. The officer gave them permission to speak with Harmon for not more than ten minutes.² Upon entering Harmon's cell, Bender was 'taken aback' because the cell lights were turned off and Harmon was sitting on his table in the dark. Harmon 'abruptly' moved toward Bender and began striking him. Bender noticed at the same time that Brum was fighting with Dickerson, who was also present in the cell.

"As the fight went on, Bender 'heard a loud pop at [his] feet,' looked at the floor, and saw that a shank had fallen in front of him. He 'instinctively grabbed the knife before Harmon could.' It appeared to Bender that Dickerson was stabbing Brum, so Bender stabbed Dickerson, and also stabbed Harmon, who had continuously been striking him. Bender threw the shank to the floor and kept fighting with Harmon. Corrections officers soon arrived and broke up the fight. The officers found a shank near the scene of the fight. Both Harmon and Dickerson suffered injuries and received outside medical care."

Law and Analysis

The Law of §2255 Actions

There are four grounds upon which a federal prisoner may move

to vacate, set aside, or correct his sentence: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeds the statutory maximum sentence; or (4) the sentence is "otherwise subject to collateral attack." 28 U.S.C. § 2255; United States v. Cates, 952 F.2d 149, 151 (5th Cir.), cert. den., 504 U.S. 962, 112 S.Ct. 2319 (1992). The scope of relief under § 2255 is consistent with that of the writ of habeas corpus. Cates, 952 F.2d at 151. Also, U.S. v. Placente, 81 F.3d 555, 558 (5th Cir. 1996).

Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be asserted in a collateral proceeding. U.S. v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). Also, U.S. v. Ressler, 54 F.3d 257, 259 (5th Cir. 1995).

Moreover, it is settled in this circuit that issues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in §2255 motions. U.S. v. Kalish, 780 F.2d 506, 508 (5th Cir.), cert. den., 476 U.S. 1118, 106 S.Ct. 1977 (1986). Also, U.S. v. Fields, 761 F.3d 443, 482 (5th Cir.

2014), cert. den., 2015 WL 2473303 (U.S. 6/8/2015); U.S. v. Segler, 37 F.3d 1131, 1134 (5th Cir. 1994).

Ineffective Assistance of Counsel

To establish that his legal representation at trial fell short of the assistance guaranteed by the Sixth Amendment, a convicted defendant must meet the two-pronged test set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). He must show that his counsel's performance was both deficient (i.e., that counsel did not provide reasonably effective assistance under prevailing professional norms) and prejudicial (i.e., that errors by counsel "actually had an adverse effect on the defense). The former component of the test authorizes only "highly deferential" judicial scrutiny, requiring the defendant to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. On the latter component, it is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding; rather, he must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Anderson v. Collins, 18 F.3d 1208, 1215 (5th Cir. 1994), and cases cited therein. Also, U.S. v. Segler, 37 F.3d 1131, 1136 (5th Cir. 1994).

In the context of a guilty plea, a petitioner must prove not

only that his attorney actually erred, but also that he would not have pleaded guilty but for the error. Armstead v. Scott, 37 F.3d 202, 206 (5th Cir. 1994), cert. den., 514 U.S. 1071, 115 S.Ct. 1709 (1995).

In showing he was rendered ineffective assistance of counsel in regard to his sentence, a petitioner must additionally show that there was a "reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh; relevant factors are the defendant's actual sentence, the potential minimum and maximum sentences that could have been received, the placement of the actual sentence within the range of potential sentences, and any relevant mitigating or aggravating circumstances. U.S. v. Segler, 37 F.3d at 1136.

1. Failure to Properly Investigate

First, Bender contends his trial counsel failed to properly investigate the specific manner in which he was initially charged in all of his prior state convictions from Maine-some were juvenile charges from the Maine Youth Center-which allowed the court to wrongly classify and sentence Bender as a career criminal. Although, on direct appeal the Fifth Circuit addressed Bender's claim that the two prior offenses used to charge him under the Armed Career Criminal Act, 18 U.S.C. § 924(e), constituted a

single criminal act, Bender now contends that his defense attorney should have obtained the original charging instrument to prove both offenses were originally charged together.

Bender is complaining that the two robberies (committed on September 13, 1995 and September 22, 1995) of which he was convicted on August 15, 1996 in York County, Maine and the two burglaries (of residences on September 18, 1995 and September 21, 1995) of which he was convicted on November 1, 1996 in Cumberland County, Maine were actually all part of the same "crime spree" and therefore should count as only one crime of violence rather than as two. FN1

¹ The sequence of events set forth in the sentencing transcripts from Bender's prior felony offenses in Maine (attached hereto as Appendix A) are as follows:

<u>Date</u>	<u>Event</u>
5/26/95	Bender arrested for having escaped from the Maine Youth Center (S.Ct.Me. 96-1066, 8/16/99, Tr. pp. 28-29).
9/1/95	Bender released from Maine Youth Center (S.Ct.Me. 96-1066, 8/16/99, Tr. p. 42).
9/13/95	Bender committed robbery of Mary Gorduris in her home in Saco, ME (S.Ct.Me. 96-1066, 8/16/99, Tr. p. 23).
9/15/95	Bender committed burglary of Norman Caren's home in Saco, ME (S.Ct.Me. 96-1066, 8/16/99, Tr. p. 27).
9/18/95	Bender committed reckless conduct with a weapon in Biddeford, ME (S.Ct.Me. 96-1066, 8/16/99, Tr. pp. 25-26).
9/21/95	Bender committed burglary & theft of Flannery home in Westbrook, ME (S.Ct.Me. 96-1972, 11/1/96, Tr. p. 3).
9/22/95	Bender attempted to rob Michael Buford, night

A defendant is designated a career offender if: (1) he was at least eighteen years old at the time he committed the charged offense; (2) the charged offense is a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions that were either crimes of violence or controlled substance offenses. U.S.S.G. § 4B1.1(a). Prior sentences are counted as separate offenses if an intervening arrest separated the offenses. U.S.S.G. § 4A1.2(a)(2). If there was no

9/28/95	manager at the Normandy Hotel in Maine (S.Ct.Me. 96-1066, 8/16/99, Tr. pp. 24-25). Bender committed burglary & theft of Martin home in Pownal, ME (S.Ct.Me. 96-1972, 11/1/96, Tr. p. 4).
9/28/95	Bender apprehended in the Maine Youth Center by Trooper Lowell Smith and Bender fully confessed to the Flannery and Martin burglaries to Trooper Smith (S.Ct.Me. 96-1972, 11/1/96, Tr. p. 11).
10/2/95	Bender was returned to the Maine Youth Center (S.Ct.Me. 96-1066, 8/16/99, Tr. p. 43).
June 1996	Bender placed in York Cty. Jail in Maine (S.Ct.Me. 96-1066, 8/16/99, Tr. p. 43).
8/15/96	Bender sentenced in York Cty., ME to a total of 6 years imprisonment with all but two years suspended, for 2 counts of robbery, 1 count of reckless conduct with a dangerous weapon, 1 count of burglary, 1 count of escape, and 4 counts of criminal trespass. (S.Ct.Me. 96-1972, 11/1/96).
11/1/96	Bender sentenced in Cumberland Cty., ME to a total of six years imprisonment with all but 2 and ½ years suspended, for 2 counts burglary and 2 counts theft. (S.Ct.Me. 96-1066, 8/16/99).

intervening arrest, FN2 prior sentences are counted separately unless the sentences resulted from offenses contained within the same charging instrument or the sentences were imposed on the same day. U.S.S.G. § 4A1.2(a)(2).

The phrase "two prior felony convictions" is defined in Section 4B1.2(3), which then refers to Section 4A1.2 for an explanation as to whether the prior convictions are to be counted separately. Under Section 4A1.2, prior sentences in unrelated cases are to be counted separately, but prior sentences imposed in related cases are to be treated as one sentence. Prior sentences are related "if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing." U.S.S.G. § 4A1.2, Application Note 3. Shutter v. U.S., 2007 WL 712284 (E.D.Tex. 2997).

Similar crimes are not necessarily part of a common scheme or plan. United States v. Garcia, 962 F.2d 479, 482 (5th Cir.), cert. denied, 506 U.S. 902, 113 S.Ct. 293 (1992) (declining to define "common scheme or plan," but holding that two deliveries of heroin

² In Bender's case, the presentence report (Doc. 77, pp. 8-9) shows two arrest dates for the Maine "crime spree" which took place between September 13, 1995 and October 2, 1995; the arrests are listed on September 21, 1995 and October 2, 1995. However, the records from Maine show only one arrest date-October 2, 1995. There was no intervening arrest during the Maine crime spree.

were not part of a common scheme or plan even though the crimes were temporally and geographically alike). Further, prior convictions are not "related" merely because they are part of a crime spree. United States v. Irons, 196 F.3d 634, 638 (6th Cir. 1999). The term "common scheme or plan" must mean something more than repeated convictions for the same criminal offense. The words "scheme" and "plan" are words of intention, implying that the prior offenses have been jointly planned, or at least that it would have been evident that the commission of one would entail the commission of the other as well. However, a crime merely suggested by or arising out of the commission of a previous crime is not related to the earlier crime in the special sense of being part of a common scheme or plan. United States v. Robinson, 187 F.3d 516, 520 (5th Cir. 1999), citing United States v. Ford, 996 F.2d 83, 85 (5th Cir. 1993), cert. den., 510 U.S. 1050, 114 S.Ct. 704 (1994), and United States v. Garcia, 962 F.2d 479, 481 (5th Cir. 1992), cert. den., 506 U.S. 902, 113 S.Ct. 293 (1992).

At Bender's sentencing, defense counsel argued that both of his Maine convictions (the August 15, 1996 robbery conviction(s) in York County and the November 1, 1996 burglary conviction(s) in Cumberland County) were originally charged in a single charging instrument in juvenile court (Doc. 91, p. 10/58). Although Bender was a juvenile when he committed the offenses, the State of Maine

chose to try him as an adult, so (according to Bender) the charges were split into two separate charging instruments because they fell within two different jurisdictions in the State of Maine (Doc. 91, ppp. 10-12/58). Bender explained as follows (Doc. 91, pp. 16-17):

"In my case, mine originated from the same charging instrument because in the state of Maine, the way they do it is, when you're a juvenile, they sentence you to the state of Maine. So when you go into a court proceeding, you are initially charged from wherever -- whatever jurisdiction you're in, but you're held liable because you're -- they sentence you to an undetermined sentence until the age of [sic] to the state of Maine.

"So technically, whatever charges you receive, they're just forwarded to the youth center. And then the youth center, they do a formal charging instrument against you for all your charges. So all my charges were originally charged under the same charging instrument by the Maine Youth Center. And then after that, then as I was bound over and tried as an adult because of the jurisdiction issues, that they happened in two different -- two different jurisdictions, then they split it on from there. But in the 709 amendment, it says that they were in the same original charging instrument. And in my case, it was, from the Maine Youth Center.

"And I got a letter here that I tried getting the documentation from the Maine Youth Center to try to show, but they sent me a response back saying that I had to pay for the transcripts and that they would have to look for them. So I wrote them back and told them that I didn't have the money for it, and they never responded back to me. But I was trying to get the documentation for you, and I tried contacting one of my old attorneys to try to get with Wayne or submit something to the court for you, too. All right. I just wanted to elaborate that a little bit."

The Fifth Circuit Court of Appeal considered the underlying issue on direct appeal and held the trial court did not err in

treating Bender's prior offenses separately and in designating Bender a career offender because (1) there was no record evidence that the offenses were originally contained in the same charging instrument (from the Maine Youth Center), (2) the two different docket numbers of the cases were evidence that they were charged separately in juvenile court, and (3) Bender was eventually prosecuted as an adult for the two offenses under two separate case numbers in two separate jurisdictions. U.S. v. Bender, 516 Fed.Appx. at 294-295. Bender now contends his attorney was ineffective for failing to obtain the original charging instrument from the Maine Youth Center.

However, it is quite clear under Fifth Circuit jurisprudence that, although the crimes are temporally close, they were each individual events. On September 13, 1995, Bender committed robbery of Mary Gorduris in her home in Saco, Maine (S.Ct.Me. 96-1066, 8/16/99, Tr. p. 23/44). On September 21, 1995, Bender committed burglary in the Flannery home in Westbrook, ME (S.Ct.Me. 96-1972, 11/1/96, Tr. p. 3). On September 22, 1995, Bender committed robbery of Michael Buford, night manager at the Normandy Hotel in Maine (S.Ct.Me. 96-1066, 8/16/99, Tr. pp. 24-25). On September 28, 1995, Bender committed burglary of the Martin home in Pownal, Maine (S.Ct.Me. 96-1972, 11/1/96, Tr. p. 4). The burglaries on September 21 and 28 were separated in both time and place from the robberies

which took place on September 13 and 22, each of the crimes involved a different set of victims, and there is no evidence that the crimes were all part of a common scheme or plan. Therefore, the burglaries (Maine case no. CR96-1972) and the robberies (Maine case no. CR96-1066) were correctly treated as two separate prior convictions for violent offenses for purposes of classifying Bender as a career offender under the U.S. Sentencing Guideline, regardless of whether they were originally included in the same charging instrument by the Maine Youth Center.

Bender has not shown that, even if all of his "crime spree" offenses had been listed in the original charging instrument from the Maine Youth Center, he would not have been found to be a career offender. Therefore, Bender's has not shown that he had ineffective assistance of counsel due to counsel's failure to obtain the original charging instrument(s) from the Maine Youth Center.

This ground for relief is meritless.

2. Self Defense

Next, Bender contends he had ineffective assistance of counsel because his trial attorney failed to inform him of each standard that needs to be met to claim self defense. Had defense counsel properly informed Bender, he would have seen he met those standards and proceeded to trial.

Bender raised the underlying claim on direct appeal, contending that he had acted in self-defense and that, had he understood that he was not guilty of the charged crime, he would not have pleaded guilty. The Fifth Circuit found that Bender did not prove the district judge erred in accepting his guilty plea because Bender admitted, at his sentencing, that he had considered and rejected pursuing self-defense prior to pleading guilty because he had not wanted to risk being tried and convicted. FN3 U.S. v. Bender, 516 Fed.Appx. at 293. Therefore, that issue should not be revisited by the this court. Fields, 761 F.3d at 482. Moreover, Bender has not explained what elements of self defense he did not understand when he pleaded guilty and how that affected his plea.

Since, as found by the Fifth Circuit Court of Appeals, Bender cannot show there is a reasonable probability that he would not have pleaded guilty had he been advised by his attorney as to the standards for proving self defense, Bender has not shown that he had ineffective assistance of counsel. This ground for relief is meritless.

³ At his sentencing, Bender testified (Doc. 91, p. 49/58): "And I pled guilty, like I told you originally, because of the circumstances that were involved in this case, that I didn't want to take my chance of going to trial and trying to have a self-defense case or something and then be convicted or whatever, because the point is, I did ultimately stab at them inmates or stab those inmates."

3. Hospital Reports

Next, Bender contends his trial counsel was ineffective for failing to obtain the actual hospital reports on the two victims to show whether they were injured and the extent of their injuries.

Bender was convicted of assault with a dangerous weapon, 18 U.S.C. § 133(a)(3), which is: "assault with a dangerous weapon, with intent to do bodily harm." See United States v. Estrada-Fernandez, 150 F.3d 491, 494 (5th Cir. 1998). Physical contact with the victim is not an element of assault with a dangerous weapon. Estrada-Fernandez, 150 F.3d at 494. Therefore, the question of whether or not the victims, Dickerson and Harmon, were actually injured by Bender does not affect Bender's guilty plea.

Although Bender contends there is a question as to whether Harmon and Dickerson were injured, he admitted at his sentencing that he stabbed both Dickerson and Harmon. FN4 Therefore, there does not appear to be any real contention that the victims were not actually injured to some extent.

Bender received a four-point sentencing guidelines enhancement for having injured the victims (Doc. 77; Doc. 91, p. 9/58). The

⁴ "In summary, I'd like to state that I do fully admit to stabbing both Dickerson and Harmon; however, I never had any intention at any time to stab or fight Harmon or Dickerson, nor did I ever initiate any such activity." (Doc. 91, p. 21/58).

presentence report initially gave a five-point enhancement due to the severity of the injuries (Doc. 77). On review, the enhancement was reduced to four points, since the severity of the injuries was not proven (Doc. 77).

At his sentencing, Bender admitted that he stabbed Dickerson and Harmon. On direct appeal, the Fifth Circuit found that both Dickerson and Harmon suffered some injuries and received outside medical care.

Since Bender admitted that he stabbed Dickerson and Harmon, he apparently inflicted some kind of injuries and he received a sentence enhancement for having inflicted non-severe injuries. Therefore, Bender cannot now complain about his sentence enhancement for having inflicted non-severe injuries which he admits he inflicted.

This ground for relief is meritless.

4. Uncalled Witnesses

Bender contends his counsel was ineffective for failing to interview any defense witnesses, including the victims, which would have shown Bender was defending himself. Bender contends he gave defense counsel a list of thirty inmates and ten staff members-people whom, he alleges, would be positive witnesses for him. Bender further contends he obtained about ten affidavits himself and gave them to his attorney. Bender contends his attorney

admitted that he did not contact any of them. Bender contends he lived in relative isolation in the SHU during the entire eighteen months from the date of the incident to the conclusion of his court proceedings and that, when his attorney told him he was not going to interview the inmates and staff he had listed as potential defense witnesses, Bender gave up and agreed to the plea bargain when it was offered.

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993), citing Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 1052, 2066 (1984). However, bare allegations do not suffice. A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. Nelson, 989 F.2d at 850, citing United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989). Complaints of uncalled witnesses are not favored because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative. Graves v. Cockrell, 351 F.3d 143, 155 (5th Cir. 2003), amended in other part, 351 F.3d 156 (5th Cir. 2003), cert. den., 124 S.Ct. 2160 (U.S. 2004), citing Buckelew v. United States, 575 F.2d 515, 521 (5th

Cir. 1978). Also, Boyd v. Estelle, 662 F.2d 388, 390 (5th Cir. 1981). Where the only evidence of a missing witness's testimony is from the defendant, the Court views claims of ineffective assistance with great caution. Sayre v. Anderson, 238 F.3d 631, 636 (5th Cir. 2001), citing Lockhart v. McCotter, 782 F.2d 1275, 1282 (5th Cir.1986), cert. den., 479 U.S. 1030, 107 S.Ct. 873 (1987). Unless a petitioner provides the court with affidavits (or similar matter) from the alleged favorable witnesses suggesting what they would have testified to, claims of ineffective assistance of counsel fail for lack of prejudice. Sayre, 238 F.3d at 636.

In the case at bar, Bender submitted eleven affidavits from inmates who were incarcerated in USP-Pollock in 2009, when Bender and Brum assaulted Harmon and Dickerson (Doc. 111). Some of those affidavits set forth the circumstances under which Bender was asked by Dickerson and Harmon to meet with them and indicate Bender's lack of prior planning or intent to harm Dickerson and Harmon. Other affidavits explain the arrangement purportedly prevailing at USP-Pollock between the inmates and the prison officials, which indicates some self-policing by the inmate groups in order to facilitate cooperation between the diverse groups of inmates; those affidavits purport to explain why Bender (on behalf of his group of non-gang affiliated whites) was involved in having Harmon (a

convicted child molester) placed in the SHU. FN5

⁵ Inmate Harmon's and Inmate Dickerson's 2009 affidavits state that Bender did not assault them and they do not want to be witnesses for the government (Doc. 111, Exs. B & C).

Inmate Owens' (undated) affidavit states that he heard his cellmate, Curtis, say that inmates Dickerson and Harmon had both said Bender did not assault them (Doc. 111, Ex. D).

Inmate Curtis' (undated) affidavit states that both Harmon and Dickerson told him Bender did not assault them (Doc. 111, Ex. E).

Inmate Chen's 2009 affidavit states that Dickerson told him that Bender did not assault Dickerson or Harmon (Doc. 111, Ex. F).

Inmate Staine's 2009 affidavit states that Dickerson told him that Bender did not assault Dickerson or Harmon (Doc. 111, Ex. G).

Inmate Jordon's 2013 affidavit states that he was playing handball with Bender when Bender was summoned to go and speak to another inmate (Harmon), and that he would have testified in Bender's defense but Bender's attorney never contacted him (Doc. 111, Ex. H).

Inmates Hymes' 2013 affidavit explains the self-policing agreement between USP-Pollock inmates and the prison staff (which was a result of a large-scale prison riot in 2007) to facilitate cooperation between the diverse groups of inmates, why (according to the agreement) inmate Harmon had to stay in the SHU, why (according to the agreement) Bender was involved in having Harmon put in the SHU, what the consequences would be if Harmon was not placed in the SHU, that Hymes would have testified in Bender's defense, and that Bender's attorney never contacted him (Doc. 111, Ex. I).

Inmate Dunn's 2013 affidavit explains Bender's role in having Harmon placed in the SHU, what the consequences would be if Harmon was not placed in the SHU, the fact that Bender was playing handball outside when Harmon asked to talk to Bender, that Bender did not intend to assault Harmon, that Dunn would have testified in Bender's defense, and that Bender's attorney never contacted Dunn about Bender's defense (Doc. 111, Ex. J).

Inmate Pappas' 2013 affidavit explains the self-policing agreement between USP-Pollock inmates and the prison staff (which was a result of a large-scale prison riot in 2007) to facilitate cooperation between the diverse groups of inmates, why (according to the agreement) inmate Harmon had to stay in the SHU, why

According to the affidavits from Hymes, Dunn, Pappas and Miller (Doc. 111), after the 2007 prison riot, part of the agreement between the inmates and the prison administration was to have the inmate groups help police their own members, including having "unacceptable" inmates taken out of general population. Harmon, a convicted child molester and thus an "unacceptable" inmate, was part of Bender's group of non-gang affiliated whites and, therefore, Bender's group was responsible for making sure that Harmon was put in the SHU. Hymes, Dunn, Pappas and Miller also state in their affidavits that, although Harmon was initially housed in the SHU, he was returned to general population, at which point other group leaders told Bender that his group had 24 hours

(according to the agreement) Bender was involved in having Harmon put in the SHU, what the consequences would be to Bender and Bender's group (non-gang affiliated whites) if Harmon was not placed in the SHU, that Pappas had reminded Bender and his group of those consequences if they failed to have Harmon returned to the SHU within 24 hours, and that Pappas would have testified in Bender's defense but Bender's attorney never contacted him (Doc. 111, Ex. K).

Inmate Miller's 2013 affidavit explains the self-policing agreement between USP-Pollock inmates and the prison staff (which was a result of a large-scale prison riot in 2007) to facilitate cooperation between the diverse groups of inmates, why (according to the agreement) inmate Harmon had to stay in the SHU, why Bender and his group were responsible for having Harmon put in the SHU, that he saw and spoke to Bender before the incident took place and Bender was not behaving out of character and was not armed, and that he would have testified in Bender's defense and helped his attorney find additional defense witnesses, but Bender's attorney never contacted him (Doc. 111, Ex. L).

to arrange for Harmon to return to the SHU; if they failed to do so, all of the other groups would attack Bender's group (Doc. 111). Later that day, Harmon sent another inmate to ask Bender to go and speak with him, and Bender went.

The inmates who would have testified on Bender's behalf would, according to their affidavits (Doc. 111), have testified that Bender was not armed, had not planned in advance to meet with Harmon, and was not planning to assault Harmon and Dickerson. However, none of the affiants state they witnessed the incident, none of the affiants indicate that Bender acted in self-defense, and Bender admitted that he stabbed Harmon and Dickerson. Although Harmon and Dickerson state in their affidavits that Bender did not assault them and they would not participate in his criminal trial, that does not indicate that Bender acted in self-defense.

Therefore, assuming for purposes of this motion that Bender's attorney did not contact any defense witnesses, Bender has not carried his burden of proving there is a reasonable probability that, had his attorney contacted his witnesses, Bender would have gone to trial (instead of pleading guilty) and that his witnesses' testimony would have resulted in a not guilty verdict.

This ground for relief is meritless.

5. Discovery

Next, Bender contends he had ineffective assistance of counsel

because his attorney failed to secure discovery materials such as FBI reports, criminal records of everyone involved, institutional reports of the assault, and hospital records.

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Nelson, 989 F.2d at 850. A determination of whether an investigation is reasonably adequate depends upon a variety of factors, including the number of issues in the case, the relative complexity of those issues, the strength of the Government's case, and the overall strategy of trial counsel. Baldwin v. Maggio, 704 F.2d 1325, 1333 (5th Cir. 1983), cert. den., 467 U.S. 1220, 104 S.Ct. 1669 (1984). Under Strickland, even where trial counsel has failed to adequately investigate a case, a defendant must demonstrate that he has been prejudiced by his counsel's failure. See Lockhart v. McCotter, 782 F.2d 1275, 1282 (5th Cir.1986), cert. den., 479 U.S. 1030, 107 S.Ct. 873 (1987). To show prejudice, the petitioner must prove that an alleged breach of his attorney's duty to investigate resulted in an actual and substantial disadvantage to the course of his defense. Baldwin, 704 F.2d at 1333.

First, although there are no discovery requests filed in the record of this case, it is the usual practice in the local United States Attorney's office for the Assistant United States Attorney in charge of the case to open his or her file to defense counsel

and provide copies of everything in the file, without defense counsel having to file a request for discovery. While this practice simplifies handling a case for busy defense and government attorneys, it does tend to mislead defendants into believing their counsel did not do anything to prepare their defense and makes it difficult for the courts to assess what was done.

Second, Bender has not alleged what discovery material his defense counsel failed to obtain and how it would have assisted his defense. As already noted, Bender stated at his sentencing that he had decided not to take the chance of going to trial and presenting a defense of self-defense.

Therefore, this ground for relief is also meritless.

6. Clear Photographs

Bender contends his counsel was ineffective for failing to provide clear pictures of the incident for evidence. However, Bender has not stated what clearer photographs would have shown and how they would have changed the outcome of his proceedings.

This ground for relief is also meritless.

7. FBI Agent's Testimony

Bender contends he had ineffective assistance of counsel because his attorney failed to properly question the FBI agent who testified at Bender's guilty plea proceeding. Bender has not carried his burden of proving what questions should have been

asked, what responses they would have elicited, and how those responses would have changed the outcome of his guilty plea proceeding.

It is noted that Bender's counsel asked the agent, who testified as to what he saw on a prison video that had recorded part of the incident, whether the video showed what occurred in the cell; the agent responded that the video did not show anything that had occurred in the cell and only showed the inmates continuing their fight outside of the cell (Doc. 89, p. 25/30). Bender's attorney then elicited testimony that made it clear that the video did not show that Bender was the aggressor.

Since Bender has not carried his burden of proving he had ineffective assistance of counsel, this ground for relief is meritless.

Conclusion

Based on the foregoing discussion, IT IS RECOMMENDED that Bender's Section 2255 motion should be DENIED AND DISMISSED WITH PREJUDICE.

Under the provisions of 28 U.S.C. Section 636(b)(1)(C) and Rule 72(b), parties aggrieved by this recommendation have fourteen (14) days from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within fourteen (14) days

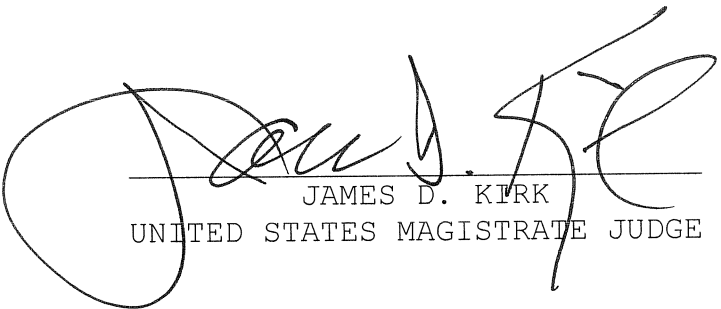
after being served with a copy of any objections or response to the District Judge at the time of filing. No other briefs (such as supplemental objections, reply briefs etc.) may be filed. Providing a courtesy copy of the objection to the magistrate judge is neither required nor encouraged. Timely objections will be considered by the district judge before he makes a final ruling.

Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in this Report and Recommendation within fourteen (14) days following the date of its service, or within the time frame authorized by Fed.R.Civ.P. 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. See *Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

Pursuant to Rule 11(a) of the Rules Governing Section 2255 proceedings for the United States District Courts, this court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Unless a Circuit Justice or District Judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. **Within fourteen (14) days from service of this Report and Recommendation, the parties may file a memorandum setting forth arguments on whether a certificate**

of appealability should issue. See 28 U.S.C. § 2253(c)(2). A courtesy copy of the memorandum shall be provided to the District Judge at the time of filing.

THUS DONE AND SIGNED in Alexandria, Louisiana on the 13th day of July 2015.



JAMES D. KIRK
UNITED STATES MAGISTRATE JUDGE

APPENDIX A

STATE OF MAINE
SUPERIOR COURT

JUDGMENT AND COMMITMENT

Docket No. CR-96-1066	County YORK	Date 8/15/96	DOB 3/2/78
State of Maine v. Defendant's Name JEREMY BENDER		Residence BIDDEFORD, ME	
Offense(s) charged: CT 1 and 2: TL7-A MRSA §651 ROBBERY CLASS A CT 2: TL7-A MRSA §651 ROBBERY CLASS B CT 3: TL7-A MRSA §211 RECKLESS CONDUCT WITH A DANGEROUS WEAPON CLASS C CT 4: TL7-A MRSA §401 BURGLARY CLASS B CT 5: TL7-A MRSA §755 ESCAPE CLASS C CT 6: TL7-A MRSA §402 CRIMINAL TRESPASS CLASS E CT 7, 8 & 9: TL7-A MRSA §402 CRIMINAL TRESPASS CLASS D Plea(s): GUILTY TO CT 1, 3, 5, 6, 7, 8 & 9; GUILTY AS AMENDED IN CT 2		Charged by: <input type="checkbox"/> indictment <input checked="" type="checkbox"/> information <input type="checkbox"/> complaint	
Offense(s) convicted: CT 1 and 2: TL7-A MRSA §651 ROBBERY CLASS A CT 2: TL7-A MRSA §651 ROBBERY CLASS B CT 3: TL7-A MRSA §211 RECKLESS CONDUCT WITH A DANGEROUS WEAPON CLASS C CT 4: TL7-A MRSA §401 BURGLARY CLASS B CT 5: TL7-A MRSA §755 ESCAPE CLASS C CT 6: TL7-A MRSA §402 CRIMINAL TRESPASS CLASS E CT 7, 8 & 9: TL7-A MRSA §402 CRIMINAL TRESPASS CLASS D		Convicted on: <input checked="" type="checkbox"/> plea of guilty <input type="checkbox"/> plea of nolo <input type="checkbox"/> jury verdict <input type="checkbox"/> court finding	
IT IS ADJUDGED THAT THE DEFENDANT IS GUILTY OF THE OFFENSES AS SHOWN ABOVE AND CONVICTED.			
<input checked="" type="checkbox"/> IT IS ADJUDGED THAT THE DEFENDANT BE HEREBY COMMITTED TO THE SHERIFF OF THE WITHIN NAMED COUNTY OR HIS AUTHORIZED REPRESENTATIVE WHO SHALL WITHOUT NEEDLESS DELAY REMOVE THE DEFENDANT TO: <input checked="" type="checkbox"/> The custody of the Commissioner of the Department of Corrections, at a facility designated by the Commissioner, to be punished by imprisonment for a term of <u>6 YEARS AS TO CT 1; CT 2: 4 YEARS CONSECUTIVE TO CT 1; CT 3: 2 YEARS CONCURRENT W/CT 1; CT 4: 12 MONTHS CONCURRENT WITH CT 1; CT 5: 364 DAYS CONCURRENT WITH CT 1</u> <input checked="" type="checkbox"/> The County jail to be punished by imprisonment for a term of <u>COUNTS 6 THRU 9: 6 MONTHS CONCURRENT W/CT 1 AND TO BE Served in YCJ</u> <input type="checkbox"/> This sentence to be served consecutive to _____ <input type="checkbox"/> Execution stayed to on or before: _____ at _____ (a.m.) (p.m.)			
<input checked="" type="checkbox"/> IT IS ORDERED THAT ALL (BUT) <u>2 YEARS AS TO CT 1</u> OF THE FOREGOING SENTENCE BE SUSPENDED AND THE DEFENDANT BE COMMITTED TO THE CUSTODY AND CONTROL OF THE DIVISION OF PROBATION AND PAROLE FOR A TERM OF <u>6 YR AS TO CT 1 & 4 YR AS TO CT 2 - TOTAL OF TEN (10) YEARS</u> UPON CONDITIONS ATTACHED HERETO AND INCORPORATED BY REFERENCE HEREIN. SAID PROBATION TO COMMENCE (_____) (UPON COMPLETION OF THE UNSUSPENDED TERM OF IMPRISONMENT). THE DEFENDANT SHALL SERVE THE INITIAL PORTION OF THE FOREGOING SENTENCE AT _____ <input type="checkbox"/> The final _____ month(s) of the unsuspended portion of the term of imprisonment is to be served with intensive supervision under conditions separately specified and incorporated herein.			
<input type="checkbox"/> IT IS ORDERED PURSUANT TO APPLICABLE STATUTES, THAT THE DEFENDANT'S MOTOR VEHICLE OPERATOR'S LICENSE OR PERMIT TO OPERATE, RIGHT TO OPERATE A MOTOR VEHICLE AND RIGHT TO APPLY FOR AND OBTAIN A LICENSE IS SUSPENDED FOR A PERIOD OF _____ <input type="checkbox"/> IT IS FURTHER ORDERED THAT THE DEFENDANT'S RIGHT TO REGISTER A MOTOR VEHICLE IS SUSPENDED AND THE REGISTRATION PLATES ISSUED TO THE DEFENDANT BY THE STATE ARE SUSPENDED. <input type="checkbox"/> Suspension effective beginning _____ at _____ (a.m.) (p.m.) <input type="checkbox"/> Suspension effective beginning after release from incarceration. (17-A MRSA §1103, sub-§ 6.)			

- ☐ IT IS ORDERED THAT THE DEFENDANT FORFEIT AND PAY THE SUM OF _____ DOLLARS, AS A FINE, PLUS A 10% SURCHARGE, TO THE CLERK OF THE COURT. (4 M.R.S.A. § 1057)
- ☐ IT IS FURTHER ORDERED THAT THE DEFENDANT PAY AN ADDITIONAL: ☐ \$30.00 ☐ \$125.00 SURCHARGE TO THE CLERK OF THE COURT. (29 M.R.S.A. § 1312-B(5), 29-A M.R.S.A. § 2411 (7))
- ☒ IT IS FURTHER ORDERED THAT THE DEFENDANT PAY AN ASSESSMENT OF \$10.00 FOR EACH CLASS D AND E CONVICTION AND \$25.00 FOR EACH MURDER AND CLASS A, B, AND C CONVICTION FOR A TOTAL OF \$165.00 WAVED TO THE CLERK OF THE COURT FOR THE VICTIMS' COMPENSATION FUND. (5 M.R.S.A. § 3360-1) \$ _____ OF THE ASSESSMENT HAS BEEN PAID.
- ☐ All but _____ suspended.
- ☐ Execution/payment stayed to pay in full by _____ or warrant to issue.
- ☐ To pay \$ _____ per week / month beginning _____ or warrant to issue.

- ☐ IT IS ORDERED THAT EXECUTION OF THE FOREGOING SENTENCE AS IT RELATES TO THE FINE BE SUSPENDED AND THE DEFENDANT BE COMMITTED TO THE CUSTODY AND CONTROL OF THE DIVISION OF PROBATION AND PAROLE FOR A TERM OF _____ UPON CONDITIONS ATTACHED HERETO AND INCORPORATED BY REFERENCE HEREIN.

- ☐ IT IS ORDERED THAT THE DEFENDANT PERFORM _____ HOURS OF COMMUNITY SERVICE WORK WITHIN _____ (WEEKS) (MONTHS) FOR THE BENEFIT OF _____

- ☒ IT IS ORDERED THAT THE DEFENDANT FORFEIT AND PAY THE SUM OF PROBATED MAXIMUM OF \$10,000.00 (17-A M.R.S.A. § 1152-2-A) DOLLARS AS RESTITUTION, THROUGH THE (DIVISION OF PROBATION AND PAROLE) (DISTRICT ATTORNEY'S OFFICE) FOR THE BENEFIT OF VICTIM. *\$1000/YR DOES NOT APPLY TO THE 1ST YR OF PROBATION - TO START THE 2ND YEAR (\$1000.00 or more as per PFD)
- ☐ Execution/payment stayed to pay in full by \$1000/YR or warrant to issue.

- ☐ IT IS ORDERED THAT THE DEFENDANT PAY _____ FOR EACH DAY SERVED IN THE COUNTY JAIL, TO THE TREASURER OF THE ABOVE NAMED COUNTY. (17-A M.R.S.A. § 1341)
- ☐ Execution/payment stayed to pay in full by _____ or warrant to issue.

- ☐ IT IS ORDERED THAT THE DEFENDANT SHALL PARTICIPATE IN ALCOHOL AND OTHER DRUG EDUCATION, EVALUATION AND TREATMENT PROGRAMS FOR MULTIPLE OFFENDERS ADMINISTERED BY THE DEPARTMENT OF HUMAN SERVICES. (29 M.R.S.A. § 1312-B (2)(D-1), 29-A M.R.S.A. § 2411 (5)(B))

- ☐ IT IS ORDERED THAT THE DEFENDANT FORFEIT TO THE STATE THE FIREARM USED BY THE DEFENDANT DURING THE COMMISSION OF THE OFFENSE(S) SHOWN ABOVE. (17-A M.R.S.A. § 1158)

- ☐ IT IS ORDERED THAT THE DEFENDANT BE UNCONDITIONALLY DISCHARGED. (17-A M.R.S.A. § 1201)

IT IS FURTHER ORDERED THAT THE CLERK DELIVER A CERTIFIED COPY OF THIS JUDGMENT AND COMMITMENT TO THE SHERIFF OF THE ABOVE NAMED COUNTY OR HIS AUTHORIZED REPRESENTATIVE AND THAT THE COPY SERVE AS THE COMMITMENT OF THE DEFENDANT. REASONS FOR IMPOSING CONSECUTIVE SENTENCES ARE CONTAINED IN THE COURT RECORD OR IN ATTACHMENTS HERETO.

A TRUE COPY, ATTEST:

Deanne Hill
Clerk, Superior Court

[Signature]
Justice, Superior Court

I understand the sentence imposed herein and acknowledge receipt of a copy of this JUDGMENT AND COMMITMENT.

Dated: 8-16-96

[Signature]
Defendant

RETURN

By virtue of the within JUDGMENT AND COMMITMENT I have this day delivered the within-named Defendant to the _____

Dated: _____

Deputy Sheriff

By virtue of this warrant, the within-named Defendant has been removed to and received at the _____

on this day.

Dated: _____

Authorized Officer/Supt., M.C.C./Warden M.S.P.

From: Federal Public Defender

To: 913184737435

12/20/2010 17:34

#421 P.007/044

SUMMARY OF TRANSCRIPT FILED

REPORTER: Kathleen S. Casey

RCA: Jeff Henthorn

CASE NAME: State of Maine v. Jeremy Bender

DOCKET NO: CR-96-1066

DATE OF PROCEEDING: 8-15-96

INDIGENT: Yes () No (X)

DATE OF APPEAL:

DATE OF FIRM ORDER: May 7, 1999

PLACE FILED: Clerk's Office

DATE FILED: 12-20-99

NUMBER OF PAGE: 62


Receiving Official12-21-99
Date

Please forward to:

Jeff Henthorn, RCA
205 Newbury Street
PO Box 328
Portland, ME 04112
(207) 822-41761999 DEC 21 A 9 30
STATE OF MAINE
CUMBERLAND, SS
CLERK'S OFFICECopy given
T.H.H.

STATE OF MAINE SUPERIOR COURT
YORK, SS CRIMINAL ACTION
CR-96-1066

STATE OF MAINE

v.

JEREMY BENDER,
Defendant

PROCEEDINGS
(Sentencing)

BEFORE:

HONORABLE LEIGH I SAUFLEY, JUSTICE OF
SUPERIOR COURT

York County Courthouse
Alfred, Maine

August 15, 1999

APPEARANCES:

For the State: Jeffrey Moskowitz, ADA

For the Defendant: Edwin P. Chester, Esquire

Kathleen S. Casey, CSR
Official Court Reporter

PROCEEDINGS

(The following matter came on for hearing before
the Honorable Leigh I. Saufley, Justice, at the
Superior Court in Alfred, Maine, on August 15,
1996.)

MR. MOSKOWITZ: There will be an
amended, I am told by Mr. Chester that we have
reached an agreement as to what we're going to
be recommending to the court.

THE COURT: I see.

MR. MOSKOWITZ: Taking into
consideration the, what we discussed in
chambers.

THE COURT: All right. Mr. Chester, are
you prepared to proceed?

MR. CHESTER: Yes, judge.

THE COURT: Step right up then Jeremy
Bender.

Let me make sure I have all the
documents I need. First let me note, for the
record, CR-96-1066, Mr. Bender is here with his
attorney, Mr. Chester.

I have before me an information
and this information contains nine separate
counts. Among those counts, the first five are

felonies, the last four are misdemeanors.

Mr. Bender, let me first ask you this
question, sir; how old are you?

THE DEFENDANT: 18.

THE COURT: And you have been bound over
to the Superior Court after a proceeding in the
District Court, is that right?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And during that proceeding
you were represented by Mr. Chester?

THE DEFENDANT: Yes.

THE COURT: And you understand the
charges that have been filed against you?

THE DEFENDANT: Yes.

THE COURT: Have you read this
information?

THE DEFENDANT: Yes.

THE COURT: Do you understand each of
the charges in the information, Mr. Bender?

THE DEFENDANT: Yes.

THE COURT: Mr. Bender, are you sober
this morning?

THE DEFENDANT: Yes.

THE COURT: You look tired to me. Have
you had a bad week?

THE DEFENDANT: No, it was just
medication that they have me on, it slows me
down.

THE COURT: What is the medication?

THE DEFENDANT: Gladene (phonetic).

THE COURT: And what is it prescribed
for?

THE DEFENDANT: To slow me down.

THE COURT: To slow you down?

THE DEFENDANT: Yeah.

THE COURT: And do you perceive it to be
slowing you down?

THE DEFENDANT: Yeah.

THE COURT: Yes?

THE DEFENDANT: Yes.

THE COURT: How long have you been on
this medication?

THE DEFENDANT: Six months.

THE COURT: Does it interfere with your
ability to understand things?

THE DEFENDANT: No.

THE COURT: Does it cause you any
difficulty in perceiving what is going on around
you?

THE DEFENDANT: No.

5

1 THE COURT: And you have been on it long
2 enough now so you understand its effects on you?

3 THE DEFENDANT: Yes.

4 THE COURT: Mr. Chester, you have been
5 working with Mr. Bender throughout this period
6 of medication and I understand there have been
7 other medications that he has at least attempted
8 to assist him with some of his issues in the
9 past; have you found that in the last six months
10 you have had any difficulty communicating with
11 him?

12 MR. CHESTER: No, judge, and we have
13 spent a significant amount of time this morning
14 discussing this -- these issues and the changes
15 and the plea offers and agreements and my
16 discussions with the district attorney and based
17 on the responses that Jeremy has made to my
18 questions and suggestions I believe that he
19 understands the nature of these proceedings and
20 the nature of my negotiations and understanding
21 with the district attorney.

22 THE COURT: All right, thank you, Mr.
23 Chester. Mr. Bender, do you agree with Mr.
24 Chester that you understand what is happening
25 here this morning?

7

1 never gone through a grand jury process, they
2 have come directly to the court, do you
3 understand that?

4 THE DEFENDANT: Yes.

5 THE COURT: *It's my understanding this*
6 *has been done in part at the request of your*
7 *attorney because as of right now you are not*
8 *receiving credit for the time that you are*
9 *incarcerated, is that correct, Mr. Chester?*

10 MR. CHESTER: That is my understanding
11 of the law, Your Honor.

12 THE COURT: All right. And, Mr. Bender,
13 you understand that before you can proceed this
14 morning, before I can act on this information, I
15 need to determine whether you want to approve
16 this going forward by an information or whether
17 you wish to have the grand jury screen these
18 *charges against you, do you understand that,*
19 *sir?*

20 THE DEFENDANT: Yes.

21 THE COURT: Do you want to proceed here
22 this morning?

23 THE DEFENDANT: Yes.

24 THE COURT: Do you wish to waive your
25 right to have the matters presented to the grand

6

1 THE DEFENDANT: Yes.

2 THE COURT: And you feel comfortable
3 going forward? You know this is a very serious
4 event that your attorney tells me you are about
5 to enter pleas of guilty to each of these nine
6 counts, is that your intention?

7 THE DEFENDANT: Yes.

8 THE COURT: You do understand if you
9 enter these pleas today and I sentence you today
10 this will be your final time in court, assuming
11 that there are no problems during the
12 probationary period, with regard to these
13 charges; you are very clear that this is it?

14 THE DEFENDANT: Yes.

15 THE COURT: And you are ready to go
16 forward?

17 THE DEFENDANT: Yes.

18 THE COURT: All right. Let me just
19 explain to you then that with regard to these
20 charges you have a right to have them presented
21 to the grand jury, grand jury would have
22 reviewed the charges and determined whether or
23 not the charges should have been brought. In
24 this case the State has presented the charges
25 through an information, which means they have

8

1 jury?

2 THE DEFENDANT: Yes.

3 THE COURT: All right, I am going to
4 give you a document, this is a waiver, I want
5 you to go over that with Mr. Chester, make sure
6 you understand it thoroughly. Take your time.

7 Thank you. Now, Mr. Bender, this
8 is your signature?

9 THE DEFENDANT: Yes.

10 THE COURT: And, Mr. Chester, I saw you
11 sign --

12 MR. CHESTER: Yes, judge.

13 THE COURT: And neither of you have any
14 hesitation about proceeding here this morning?

15 MR. CHESTER: No, Your Honor.

16 THE COURT: All right. The Court's
17 approval has been given. Do counsel agree, I
18 *don't think we ever actually discussed this,*
19 *it's my understanding if Jeremy Bender in fact*
20 *pleads guilty to each of these charges and if I*
21 *accept the plea agreement that counsel for both*
22 *the State and the Defendant have agreed to the*
23 *sentence that would be imposed, there's no*
24 *longer an issue about which both parties wish to*
25 *argue, is that now correct?*

9

1 MR. MOSKOWITZ: That is what I
2 understand, Your Honor.
3 MR. CHESTER: Yes, judge.
4 THE COURT: Mr. Chester, and I should
5 probably make it clear for the record that in
6 advance of this proceeding here today counsel
7 provided me with psychological evaluations, two
8 of them with regard to Mr. Bender, that I have
9 discussed the matters with counsel and that I
10 have indicated some concerns earlier about the
11 length of a second sentence the State was going
12 to be recommending. We had quite a free-ranging
13 discussion about the purposes of sentencing in a
14 case such as this which is relatively unusual
15 and I understand that counsel have now reached
16 an agreement. I am going to assume, counsel,
17 since there's nothing indicated otherwise in the
18 record, that the maximum on the Class A's
19 charged against Mr. Bender at any rate in this
20 case would be no greater than 20 years, is that
21 correct?
22 MR. MOSKOWITZ: Yes, Your Honor.
23 THE COURT: State would not be arguing
24 this as a 40-year case?
25 MR. MOSKOWITZ: No.

11

1 confused. First the charges Count I and II are
2 robbery, Class A charges, and they both do carry
3 with them the possibility of a jail sentence of
4 up to 20 years in jail; you understand that?
5 THE DEFENDANT: Yes.
6 THE COURT: The Class B offenses carry
7 the possibility of a sentence of up to ten
8 years; the Class C up to five years, and then
9 there are I think four misdemeanors. Let me
10 make sure I am clear on that. The last four
11 charges are misdemeanors. One is a Class E and
12 the sentence on that may be up to six months,
13 and the last three are Class D's, the sentence
14 may be up to a day short of a year; do you
15 understand the sentencing possibilities on these
16 charges?
17 THE DEFENDANT: Yes.
18 MR. MOSKOWITZ: Excuse me, if I could
19 interject, Count II, that is a typographic
20 error, it's a Class B offense, shouldn't be
21 listed as a Class A.
22 THE COURT: State moves to amend the
23 typo, and no objection?
24 MR. CHESTER: That is correct.
25 THE COURT: So this should be a Class B

10

1 THE COURT: You understand why I am
2 talking to the attorneys about these things, Mr.
3 Bender?
4 MR. CHESTER: Yeah.
5 THE DEFENDANT: Yes.
6 THE COURT: You have a question there?
7 I see you checking with Mr. Chester. And I want
8 to make sure you feel free --
9 THE DEFENDANT: No, I just didn't
10 understand the question.
11 THE COURT: In the event you are
12 convicted of a Class A crime and the judge
13 sentences you without a plea agreement before
14 the judge, some Class A crimes carry the
15 possibility of a jail sentence of up to 40
16 years, rather than in your case up to 20 years
17 and it's important to me to know before we begin
18 the sentencing which range of cases your crimes
19 or these allegations fall in so I check with
20 counsel to make sure nobody is saying to me
21 today that these are 40-year offenses, these --
22 those would be the most serious of the Class A
23 offenses, all right?
24 THE DEFENDANT: All right.
25 THE COURT: But I don't want you to be

12

1 and I will grant the motion to amend.
2 MR. MOSKOWITZ: And also, Your Honor, on
3 Count III there would be a minimum mandatory
4 period of incarceration on Count III, which
5 would be a minimum mandatory period of one year.
6 THE COURT: All right, let me just take
7 a look. Count III alleges the use of a handgun
8 and, therefore, with all allegations in Count
9 III a minimum mandatory sentence of at least a
10 year would have to be imposed on that count, you
11 understand that, Mr. Bender?
12 THE DEFENDANT: Yes.
13 THE COURT: You understand now that
14 Count II is not a Class A charge, it's a Class B
15 charge but carries a possibility of a sentence
16 up to ten years?
17 THE DEFENDANT: Yes.
18 THE COURT: You are clear on that?
19 THE DEFENDANT: Yes.
20 THE COURT: All right. Count II does
21 not allege -- there's an intent to use force?
22 MR. MOSKOWITZ: A threat to use force,
23 yes, Your Honor.
24 THE COURT: And Count I alleges actual
25 use of a dangerous weapon, that is the stick?

13

1 MR. MOSKOWITZ: That is correct.
2 THE COURT: All right. Now Count IV is
3 a Class B burglary and alleges a burglary into a
4 dwelling place. Count V is a charge of escape,
5 that is the Class C. All right, Mr. Bender,
6 going through all of these relatively rapidly,
7 if you have any question about any of these
8 charges, I am going to suggest, again, that you
9 stop me and you feel free to talk to Mr.
10 Chester. It's also, and the record should
11 probably reflect this, you are working with Mr.
12 Chester with regard to charges that are now
13 pending in Cumberland County, is that right?
14 THE DEFENDANT: Yes.
15 THE COURT: And those charges are going
16 to be addressed sometime within the next month?
17 MR. CHESTER: I would hope so, judge.
18 THE COURT: You are still working on the
19 issues.
20 MR. CHESTER: Well, I think we have an
21 agreement. The question is when they will
22 actually come before the court.
23 THE COURT: All right. Do those charges
24 because of Mr. Bender's situation carry the same
25 problem, that is that he will not get credit for

15

1 understand that, Mr. Bender?
2 THE DEFENDANT: Yes.
3 THE COURT: And with that right you give
4 up your right to have a speedy and public trial
5 by a judge or a jury. You give up your right to
6 present witnesses on your own behalf. You give
7 up your right to have Mr. Chester confront and
8 cross-examine the witnesses presented by the
9 State, you understand that?
10 THE DEFENDANT: Yes.
11 THE COURT: You will also give up your
12 right to testify yourself as to any one of these
13 charges; however, even if you asked for a trial
14 you would never give up your right to remain
15 silent. What that means is if you chose to have
16 a trial on any or all of these charges you could
17 not be required to testify. And if you did not
18 testify a court would instruct a jury that that
19 could not be held against you, do you understand
20 that?
21 THE DEFENDANT: Yes.
22 THE COURT: You understand that on each
23 one of these charges separately and individually
24 the State would have to prove each element of
25 the charge beyond a reasonable doubt to a

14

1 time that he is serving now?
2 MR. CHESTER: Yes.
3 MR. MOSKOWITZ: But he's not been bound
4 over to date, Your Honor, on those matters.
5 They are still juvenile charges right now.
6 THE COURT: In the juvenile court?
7 MR. MOSKOWITZ: That is right.
8 MR. CHESTER: That is right.
9 THE COURT: Do you anticipate proceeding
10 in the juvenile court on those charges?
11 MR. CHESTER: Well I think we'll have an
12 agreement by which any sentence imposed there
13 will be served concurrently to the sentence
14 imposed here.
15 THE COURT: All right, the sentence,
16 however, is anticipated to be slightly longer?
17 MR. CHESTER: Yes, that is correct.
18 THE COURT: All right. Mr. Bender, you
19 understand everything so far?
20 THE DEFENDANT: Yes.
21 THE COURT: Let me just explain to you
22 if you plead guilty to these charges, to all of
23 these charges, on any one of these charges you
24 have a right to have a trial. If you plead
25 guilty you give up that right forever, do you

16

1 unanimous jury, you understand that, Mr. Bender?
2 THE DEFENDANT: Yes.
3 THE COURT: Now you have talked with Mr.
4 Chester about all of these rights?
5 THE DEFENDANT: Yes.
6 THE COURT: And you are clear that you
7 understand what you are giving up here today?
8 Mr. Chester I assume, given the way this matter
9 is before the court, there have been no pretrial
10 motions after the bindover hearing.
11 MR. CHESTER: That is correct.
12 THE COURT: And you are confident that
13 that process is not necessary under the
14 circumstances?
15 MR. CHESTER: Yes, judge.
16 THE COURT: You have received discovery
17 and have had a full opportunity to review
18 discovery?
19 MR. CHESTER: It's voluminous, judge, and
20 we have had an opportunity to review it.
21 THE COURT: And all of that was
22 available during the bindover process?
23 MR. CHESTER: Yes.
24 THE COURT: None of this was a surprise?
25 MR. CHESTER: No.

17

1 THE COURT: Go through each one of these
2 charges and make sure you understand the
3 elements of the charges and what the State would
4 have to prove. Now I see that this is not
5 something you are happy to be going through,
6 it's necessary for me to make sure you
7 understand what you are doing. If you have any
8 questions, stop me, all right?

9 THE DEFENDANT: Yes.

10 THE COURT: The first charge, Count I,
11 is a charge of robbery, it is Class A, that is
12 the one that carries the 20 year possible
13 sentence. In that count the State would have to
14 prove beyond a reasonable doubt that in fact you
15 committed or attempted to commit theft by
16 obtaining or exercising unauthorized control
17 over the property of another person, in this
18 case Mary Gorduris (phonetic), and specifically
19 in this case the State alleges that the property
20 was a pocketbook and its contents, that you
21 intended to deprive her of that pocketbook and
22 its contents and that you were armed with a
23 dangerous weapon, specifically, a four-foot-long
24 stick during the course of the robbery. Do you
25 understand those elements?

19

1 against a person and in so doing recklessly
2 created a substantial risk of serious bodily
3 injury to that person or persons, in this case
4 the State alleges Ed Greenleaf or Ricky Eli, by
5 firing a nine millimeter handgun in the
6 direction of a motor vehicle and residences at
7 the Five Points intersection; you understand
8 those elements, sir?

9 THE DEFENDANT: Yes.

10 THE COURT: There is then a burglary
11 count in Count IV is a Class B offense. And in
12 that charge the State would have to have proved
13 that you entered or surreptitiously remained in
14 a structure, that the structure was in fact a
15 dwelling place. In this case the State alleges
16 the dwelling place of Norman Caren, that you
17 knew you were not licensed or privileged to be
18 in that structure, and that you were there with
19 the intent to commit the crime of theft. Do
20 you understand those elements, sir?

21 THE DEFENDANT: Yes.

22 THE COURT: With regard to the escape
23 charge the State would have to prove that you
24 did intentionally leave the official custody of
25 the Maine Youth Center, that you did so without

18

1 THE DEFENDANT: Yes.

2 THE COURT: With regard to Count II the
3 State would have to prove once again that you
4 did commit or attempt to commit theft by
5 obtaining or exercising unauthorized control
6 over the property of the Normandy Motel,
7 specifically U.S. currency, that you intended to
8 deprive the motel of that currency, that you
9 threatened to use force against a person at the
10 time you attempted to commit the theft,
11 specifically Michael Buford (phonetic), and that
12 you intended to compel that person who had
13 control of the property to give it up to you or
14 to engage in conduct which aids in the taking or
15 carrying away of the property. Now those are
16 the elements. You have discussed those with Mr.
17 Chester?

18 THE DEFENDANT: Yes.

19 THE COURT: You understand essentially
20 what it is the State would have to prove?

21 THE DEFENDANT: Yes.

22 THE COURT: The third count is a charge
23 of reckless conduct with a firearm, it is the
24 Class C offense, and in that count the State
25 would have to prove that you did use a firearm

20

1 official permission, that you were there
2 pursuant to a juvenile disposition for a
3 juvenile crime that had been imposed by the
4 district court, specifically the Lewiston
5 District Court; do you understand those
6 elements?

7 THE DEFENDANT: Yes.

8 THE COURT: All right, now with regard
9 to the last four charges you are charged with
10 criminal trespass on all four charges. In each
11 of those charges the State would have to prove
12 that you, knowing you were not licensed or
13 privileged to enter a structure, entered that
14 structure, which was locked or barred, and in
15 this, in the four counts the State alleges first
16 that you entered a structure, which was the Twin
17 City Market. In Count VII the State alleges
18 that you entered the dwelling place of Timothy
19 Roberge and Scott Bolier. In Count VIII the
20 State alleges that you entered the dwelling
21 place of Diane and Charles Turgin, and in Count
22 IX the State alleges that you entered the
23 dwelling place of Ronald Lapoint. Do you
24 understand the elements of a criminal trespass
25 charge?

21

1 THE DEFENDANT: Yes.
2 THE COURT: That is that the structure
3 was locked or barred and that you had no license
4 or privilege to be in it, you understand that?
5 THE DEFENDANT: Yes.
6 THE COURT: All right. Are there any of
7 those charges that you do not understand, Mr.
8 Bender?
9 THE DEFENDANT: No.
10 THE COURT: And you are clear that you
11 understand that the State would have to have
12 proved each element of any one of those charges
13 before there could be a conviction against you
14 on that charge?
15 THE DEFENDANT: Yes.
16 THE COURT: Additionally the State would
17 have to prove those elements beyond a reasonable
18 doubt to a unanimous jury. Very clear on all
19 these things?
20 THE DEFENDANT: Yes.
21 THE COURT: Mr. Bender, have you ever
22 appeared in the Superior Court before?
23 THE DEFENDANT: No.
24 THE COURT: This is your first
25 appearance in this court?

23

1 THE COURT: Has anyone threatened you in
2 order to get you to plead guilty and give up
3 your rights?
4 THE DEFENDANT: No.
5 THE COURT: Has anyone promised you
6 anything in exchange for this plea of guilty
7 with the exception of the plea agreement that I
8 will hear from the attorneys in just a moment?
9 THE DEFENDANT: No.
10 THE COURT: All right, I am going to ask
11 you to listen very carefully to what Mr.
12 Moskowitz is about to tell me about what would
13 have been presented if these charges were to go
14 to trial.
15 MR. MOSKOWITZ: Thank you, Your Honor.
16 With respect to Count I, on September 13th,
17 1995, a woman named Mary Gorduris, who lives in
18 Saco, heard a knock on her door. Miss Gorduris
19 is seventy five years old. Thinking that her
20 sister Mini was at the door she started to open
21 it and saw a tall male person standing there
22 with a stick in his hand, the stick was about
23 four feet long or thereabouts. This person is
24 the Defendant who stands before you who Miss
25 Gorduris tried to close the door but Mr. Bender

22

1 THE DEFENDANT: Yes.
2 THE COURT: You have been in juvenile
3 court before?
4 THE DEFENDANT: Yes.
5 THE COURT: And you have never been
6 through -- now you question that?
7 THE DEFENDANT: No, I was here two days
8 ago, does that count?
9 MR. CHESTER: Yes.
10 THE COURT: It sort of counts. We
11 didn't, as I recall, go through any particular
12 process. You were here and the matter was set
13 over. All right, before I hear from the State
14 with regard to what would have been presented if
15 these matters were to go to trial, Mr. Bender, I
16 want to make sure you are entering into this
17 plea here today voluntarily. Do you know what I
18 mean by voluntarily?
19 THE DEFENDANT: Yes.
20 THE COURT: Are you doing this of your
21 own free will?
22 THE DEFENDANT: Yes.
23 THE COURT: Has anyone pressured you
24 into entering a plea here today?
25 THE DEFENDANT: No.

24

1 put his foot in the door and pushed it open.
2 When he entered the house he held the stick up
3 across his chest and was pushing it at Miss
4 Gorduris causing her to fall backward into the
5 house. He told her he wanted her money. She
6 indicated she just had her pocketbook. He did
7 not assault Miss Gorduris but he told her at
8 that time to get the pocketbook or he would let
9 her have it, those were the words he used, let
10 her have it, indicating that with the stick he
11 was holding. He then followed her into the
12 kitchen where her pocketbook was located. She
13 then handed him that pocketbook and he left.
14 He was accompanied at that time by another
15 juvenile name Geoffrey Nasianti (phonetic), who
16 also was charged with that offense.
17 As to Count II, on September 22nd,
18 1995, a person named Michael Buford was working
19 at the Normandy Motel as night manager. At
20 approximately 11:00 o'clock that evening Mr.
21 Bender entered the lobby of the motel and asked
22 Mr. Buford to change a ten dollar bill into two
23 five dollar bills. Mr. Buford then went into
24 the back room, which is about five to six feet
25 from the counter where Mr. Bender was standing,

25

1 Mr. Buford started to open the register and then
2 he heard Mr. Bender say excuse me, sir, but I
3 want all your money. Mr. Buford then turned
4 toward Mr. Bender and noticed that Mr. Bender
5 had a gun pointed at him. Mr. Buford described
6 the gun as a small automatic weapon. Mr. Buford
7 refused to give the money to Mr. Bender and
8 essentially told him to get out of the motel.
9 He then looked to the left, toward what was
10 actually nobody but he hoped that Mr. Bender
11 would assume there was another person in the
12 next room and said call the police right now.
13 Mr. Buford was actually the only one in the
14 office. Mr. Bender then pulled the slide back
15 on the gun he was holding and said if you don't
16 give me your money I will shoot you. Then Mr.
17 Buford said well then go ahead and shoot me, and
18 reached for a can of Lysol which was located
19 next to where he was located and began to throw
20 it at Mr. Bender. At that point Mr. Bender then
21 turn and ran out the door. He was observed
22 getting into an automobile and fled the scene.

23 With respect to Count III, Your Honor, on
24 September 18th, 1995, Mr. Bender and a person
25 named Michael Zelensky were on Mr. Zelensky's

27

1 that point they were still being chased by Mr.
2 Zelensky, Mr. Snelder and Mr. Bender in Mr.
3 Solinski's car. At that point Mr. Bender took
4 out the nine millimeter handgun and started
5 firing shots towards these individuals and one
6 of the bullets from that nine millimeter handgun
7 ended up lodging in an automobile radiator of a
8 truck that was at the intersection being driven
9 by a person named Mr. Greenleaf. One of the
10 other bullets was later found lodged in a
11 residence located in that area, that residence
12 being owned by a person named Ricky Eli.

13 As to Count IV, on September
14 15th, 1995, a person named Norman Caren who
15 lives in Saco reported that a burglary had, a
16 *theft had taken place at his residence involving*
17 *a safe and forty thousand dollars in currency.*
18 It was learned at that time through
19 investigation that the police engaged in that a
20 person named Mario Hale was driving a truck
21 owned by a James Sacuso (phonetic). These were
22 all friends of Mr. Bender. Mr. Bender was also
23 present at that time. Mr. Hale driving the
24 truck parked at a location in Saco known as
25 Bob's Exxon which is located on Route 1. Mr.

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1 porch at his residence in Biddeford. Four
2 individuals pulled into the yard in a Chevrolet
3 Corsica automobile. When they got out of the
4 car they assaulted Mr. Bender. That was
5 essentially surrounding, about a situation where
6 Mr. Bender had allegedly taken a handgun from
7 them earlier. Mr. Bender also allegedly owed
8 him some money. There was a shoving match that
9 took place and verbal fight also took place. At
10 some point in time the individuals got back into
11 their car and started driving away from the
12 area. As they began driving away from the area
13 they, the individuals began pulling out firearms
14 or at least it appeared they began pulling out
15 some firearms. Meanwhile Mr. Bender pulled out
16 a nine millimeter handgun and fired a shot into
17 the air over the heads of the four individuals.
18 Mr. Zelensky and Mr. Bender and a person named
19 Jameson Snelder who was also at the scene jumped
20 into Mr. Solinski's car and chased after the
21 other four individuals down the street. When
22 they got to the area of the Five Points
23 intersection near the McDonalds restaurant, near
24 that intersection the four people in the lead
25 car jumped out and started running away. At

28

1 Bender and a person named Geoffrey Nasmiento
2 (phonetic) got out of the truck at that time and
3 were gone for approximately a half hour to 45
4 minutes. They returned to the truck with what
5 appeared to Mr. Hale to be a safe that was
6 loaded on to the truck and Mr. Hale drove Mr.
7 Bender and Mr. Nasmiento and Mr. Sacuso to a
8 place called Diamond Park in Saco. When they
9 got to Diamond Park Mr. Bender, Mr. Nasmiento
10 and Mr. Sacuso removed the safe from the truck,
11 brought it into the park and during the darkness
12 hours of that day, the 15th of September, they
13 ended up breaking into the safe and removing its
14 contents which included 40 thousand dollars in
15 U.S. currency.

16 With respect to Count V, on May
17 26th, 1995, Detective Davis of the Biddeford
18 Police Department was travelling on Elm Street
19 in Biddeford and he saw two people walking
20 southbound on Elm Street. Detective Davis
21 recognized one of the people as Jeremy Bender
22 who he knew very, very well and he also knew Mr.
23 Bender to be absent without leave from the Maine
24 Youth Center. Mr. — or Detective Davis chased
25 after Mr. Bender. A brief chase occurred and

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1 Mr. Bender was apprehended. And Mr. Bender had
2 been in the Youth Center pursuant to a
3 sentence -- I am sorry, a disposition from the
4 Maine -- from the Lewiston District Court
5 sitting as the juvenile court and was actually,
6 the disposition of that at that time was that
7 Mr. Bender be sent to the Maine Youth Center.
8 On May 26, 1995, he was absent without leave and
9 at that time Detective Davis presented him in
10 Biddeford.

11 THE COURT: Mr. Chester, I am going to
12 ask you once again to make sure that the
13 discovery that you have been provided comports
14 with what you have just heard from the State
15 here today?

16 MR. CHESTER: Yes, Your Honor.

17 THE COURT: And your confident that you
18 received all of the discovery that was due the
19 Defendant under these circumstances even though
20 this has been a somewhat abbreviated process?

21 MR. CHESTER: Yes, Your Honor.

22 THE COURT: Have you had a chance to
23 review the discovery with your attorney?

24 THE DEFENDANT: Yes.

25 THE COURT: Now that you have heard from

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1 Mr. Moskowitz, do you have any substantial
2 disagreement with anything that I have just
3 heard from the State?

4 THE DEFENDANT: No, Your Honor.

5 THE COURT: Mr. Bender, are you pleading
6 guilty to these charges because you are guilty
7 and for no other reason?

8 THE DEFENDANT: Yes.

9 THE COURT: Are you confident in the
10 services that Mr. Chester has provided to you?

11 THE DEFENDANT: Yes.

12 THE COURT: Do you feel you have had
13 enough time to talk with him about all of these
14 charges and the other matters that you are
15 dealing with right now?

16 THE DEFENDANT: Yes.

17 THE COURT: And has Mr. Chester assisted
18 you through the bindover process previously?

19 THE DEFENDANT: Yes.

20 THE COURT: Do you think he's given you
21 good advice during this process?

22 THE DEFENDANT: Yes.

23 THE COURT: Do you have any complaints
24 that you want to make about your situation with
25 your attorney?

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1 THE DEFENDANT: No.

2 THE COURT: Mr. Chester, you have
3 indicated that you have been involved in this
4 matter for quite a time now and you have had
5 quite a bit of involvement, in fact, the
6 bindover hearing took how long?

7 MR. CHESTER: It was a three day
8 hearing, judge.

9 THE COURT: And that was in which of the
10 district courts?

11 MR. CHESTER: Biddeford.

12 THE COURT: In the Biddeford District
13 Court. And during that time you had ample
14 opportunity to meet with and talk with Jeremy
15 Bender about the matters pending?

16 MR. CHESTER: Yes, Your Honor.

17 THE COURT: Do you feel you and he have
18 had a good client/attorney relationship?

19 THE DEFENDANT: Yes.

20 THE COURT: Any reason I shouldn't
21 accept this plea today?

22 MR. CHESTER: No, Your Honor.

23 THE COURT: Is there a plea agreement?

24 MR. MOSKOWITZ: Yes, Your Honor, and
25 after we had discussions in chambers Mr. Chester

32

1 and I have essentially agreed on the
2 recommendation to the court. It calls for the
3 following sentence: With respect to Count I,
4 the recommendation is for six years to the
5 Department of Corrections, with all but two
6 years suspended, followed by six years of
7 probation. With respect to Count II, the
8 recommendation is for four years to the
9 Department of Corrections, all suspended,
10 followed by four years of probation. And Count
11 II would run consecutive to Count I. With
12 regard to Count III, the recommendation is for
13 two years to the Department of Corrections,
14 concurrent with Count I. As to Count IV, 12
15 months to the Department of Corrections
16 concurrent with Count I. As to Count V, three
17 hundred sixty four days to the Department of
18 Corrections concurrent with Count I. And as to
19 Counts VI through IX, the recommendation would
20 be for six months to the county jail concurrent
21 with Count I. There would be essentially seven
22 special conditions of probation that we would be
23 requesting, Your Honor. They are as follows:
24 First, that Mr. Bender will reside and be
25 treated in the Day One program or its equivalent

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1 for the first year of probation. He will also
2 agree to execute the appropriate necessary
3 releases so that the Probation Department may
4 obtain relevant records. Second, that Mr.
5 Bender will engage in substance abuse treatment
6 and counseling to the satisfaction of division
7 of Probation and Parole. And, again, he will
8 agree to execute all appropriate necessary
9 releases. With respect to Count III, there
10 would be a requirement of no possession or
11 consumption of any alcohol at all or any illegal
12 drugs that aren't prescribed. With regard to
13 Count IV, there would be random searches and
14 testing of Jeremy's person, place of residence
15 and motor vehicle for any alcohol and illegal
16 drugs. The fifth condition would be that Mr.
17 Bender receive psychological counseling and
18 treatment to the satisfaction of division of
19 Probation and Parole and again he will agree to
20 execute all appropriate releases.

21 THE COURT: That is a separate
22 counseling separate from the substance abuse
23 issues?

24 MR. MOSKOWITZ: Yes, Your Honor,
25 psychological treatment, that is right. Six,

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1 hear from the State at this point as to the
2 reason for the request for the consecutive
3 sentence on Count II.

4 MR. MOSKOWITZ: Sure, Your Honor. The
5 reason for the request for consecutive
6 sentencing is, number one, it's the State's view
7 that under Section 1256, subsection, the
8 subsections A, B and D, that Mr. —, that a
9 consecutive sentence is appropriate. Again
10 those, that statute addresses circumstances
11 where consecutive sentences are appropriate.
12 The three subsections that I referred to that
13 actually apply in this case are that Counts I
14 and II are entirely different criminal episodes,
15 they didn't happen on the same day, didn't
16 happen in the same area. The second, the second
17 factor is that Mr. Bender was on a release
18 program during the time that these crimes were
19 committed, specifically he was on leave from the
20 Maine Youth Center. And the third criteria
21 which is present in this situation which makes
22 consecutive sentencing appropriate is that the
23 seriousness of the conduct that Mr. Bender
24 engaged in over this period of time requires a
25 sentence in excess of the maximum sentence

34

1 that he would have no contact direct or indirect
2 with either Jameson Sneider or Michael Zelensky.

3 THE COURT: Could you spell Zelensky?

4 MR. MOSKOWITZ: Yes, Your Honor.
5 Z-e-l-e-n-s-k-y.

6 THE COURT: Thank you.

7 MR. MOSKOWITZ: And, finally, Your
8 Honor, that Mr. Bender would pay restitution
9 prorated among all the victims where appropriate
10 in the amount, in the maximum amount of ten
11 thousand dollars by the end of the probationary
12 period. That amounts to roughly one thousand
13 dollars per year.

14 THE COURT: Before I hear from Mr.
15 Chester with regard to the recommended sentence,
16 just a couple of questions. First, Count II is
17 intended by both parties to run consecutive to
18 Count I, all other counts will run, I am sorry,
19 will run concurrent with Count I, the intention
20 of the parties there being that there will be a
21 ten year period of probation, that there will be
22 underlying that ten year period for the first
23 period the remainder of the six years which will
24 be the four years left on that and then the
25 second four year period. And I would like to

36

1 available for the most serious offense. Playing
2 into that, Your Honor, it's the State's view
3 that after reading Dr. Kerr's (phonetic)
4 evaluation and Dr. Carbon's (phonetic)
5 evaluation that Mr. Bender has some significant
6 difficulties, including substance abuse and
7 psychological problems which will require a
8 large amount of intervention, and it's, although
9 there is no magic formula to determine how long
10 Mr. Bender will need to address his problems,
11 it's the State's view that based on those
12 reports and based on the history in those
13 reports about Mr. Bender that more than six
14 years of probation is appropriate. And that is
15 why the State is recommending the consecutive
16 sentence with respect to Count I and II. It's
17 the State's view, Your Honor, just as a personal
18 observation, that this is one of the few cases
19 that come before the court where, where
20 probation can actually, it's the State's view
21 can actually make a major difference in the life
22 of a person. We have a very young person here,
23 who has really never been involved in a
24 situation where he was forced by way of where he
25 was motivated properly to address the issues

37

1 that he has a problem with. The situation that
2 will result from this sentence will create in
3 the State's view a substantial motivating factor
4 for Mr. Bender to engage in the treatment that
5 he needs to address his problems, because if he
6 doesn't, he is facing going back to prison for
7 four years. After reading Dr. Kerr's report
8 it's pretty apparent that this is not going to
9 be a very easy thing for Mr. Bender to do. It's
10 going to be tough, going to take a lot of
11 courage on Mr. Binder's part to address these
12 problems but if he has the courage to do that,
13 this is one of the few cases where probation can
14 actually matter and actually help somebody. And
15 it's the State's view that the ten years of
16 probation is something that ought to be imposed.

17 THE COURT: Thank you. Mr. Chester, is
18 this your understanding of the plea agreement?

19 MR. CHESTER: Yes, it is, judge.

20 THE COURT: Do you want to add anything
21 to the record?

22 MR. CHESTER: Um, I guess, Your Honor, I
23 would like to say a few words about Jeremy. We
24 have an agreement now and so I don't think it's
25 necessary to go into all of the detail that I

39

1 cocaine and PCP on an almost hourly basis. Two
2 of the most disinhibiting drugs that we know of.
3 He didn't engage in that kind of senseless
4 violence and I think, again, we're not excusing
5 the conduct but I think there is a reflection of
6 the character of this young man that he is not a
7 raging sociopath, that what was going on was
8 really a reflection of the depression and the
9 addiction. In terms of the firing of the gun
10 at Five Points in Biddeford, again, it's
11 inexcusable conduct and certainly people could
12 have been hurt. That was the result of an
13 argument with four drug dealers who had pulled a
14 gun on Jeremy, who had engaged in an assault on
15 Jeremy, and frankly, judge, I think you probably
16 know these individuals from perhaps your earlier
17 days in district court. Charlie Jones, Latef
18 Palay (phonetic), Tony Osborn, and Michael
19 Parker, all of whom are, certainly don't deserve
20 to be shot at but are characters who would
21 inspire that kind of anger and rage particularly
22 in a young man who was seriously addicted to
23 some very powerful substances. The purposes of
24 sentencing that I think the court should address
25 are, one, the issue of punishment and, second,

38

1 had originally wanted to but I think it's
2 important for the Court to understand that we
3 recognize that what happened here was these were
4 horrible offenses and the behavior was really
5 unexcusable and Jeremy understands that and is
6 willing to take the responsibility for that.
7 What we're dealing with here, however, is not a
8 raging sociopath but a young man who suffers
9 from depression and has suffered from depression
10 probably for ten or 12 years which resulted from
11 some of the horrible things that happened to him
12 when he was small. He also suffers from a very
13 serious substance abuse and addiction problem.
14 I think while these crimes are horrible and
15 inexcusable, if you look at what actually
16 occurred, what you had was a young man who was
17 trying to get money for drugs. In both of
18 these serious robbery situations there was
19 tremendous potential for violence, for random
20 and unnecessary violence, and in each case this
21 young man pulled back. Now that is not offered
22 as a defense but if you were dealing with a real
23 sociopath somebody could have been hurt and
24 somebody probably would have been hurt and at a
25 time when this young man was ingesting crack

40

1 the issue of deterrence. It's my position that
2 Jeremy has already been punished substantially,
3 not necessarily in connection with these crimes
4 but if you consider the young man went to the
5 Maine Youth Center on a criminal mischief
6 misdemeanor charge in 1991 and was there for
7 five years, and that five year period the
8 only -- there was never any kind of an
9 evaluation, nobody ever identified the issue of
10 depression, nobody ever did a psychological
11 evaluation. The only evidence in the record at
12 that, the Youth Center identified any problem
13 with this young man was the problem of drug and
14 alcohol addiction. They identified that the
15 month he came into the Youth Center. They
16 identified it throughout his stay and throughout
17 his stay not a single aspect of substance abuse
18 treatment was offered to Jeremy even though they
19 have a full cottage that is dedicated to nothing
20 else over there. Again, I am not offering this
21 as an excuse but I think the State has obtained
22 a pound flesh from Jeremy here. He spent most
23 of his time locked up for everything from making
24 animal noises to escape. And, again, I am not
25 going to belabor the record as I was prepared to

41

1 do but I think it's important for the court to
2 just understand one little set of incident. He
3 was originally released after two years to his
4 family in Lewiston and a tracker followed him,
5 and this was somebody he checked in with every
6 day, somebody who was both support and
7 monitoring for Jeremy and Jeremy did fine for a
8 month, they did things together, he was in for
9 his curfew, did what he needed to do, tracker
10 wrote glowing reports. The tracker moved to
11 California, nobody to fill in. Within 48 hours
12 and for the next week-and-a-half Jeremy was a
13 mess, a drunk, brought back to the Youth Center
14 acknowledging that his family just couldn't
15 manage him. He then went through a series of
16 ICU, back to the cottage, back to isolation and
17 in late January '94 he confessed to thinking
18 about wanting to run away and feeling suicidal
19 and the Youth Center's response to that was to
20 lock him in isolation, not to deal with the
21 issues but lock him in isolation. When he came
22 out, put him in the secure treatment unit, which
23 is basically a locked unit, and with your
24 indulgence I will just read the five entries
25 from that unit. On February 4th the director of

43

1 1995 and was out for about a month which is when
2 all of these things occurred. And, again, the
3 record is very clear that during that entire
4 time he was ingesting crack cocaine and PCP as
5 much and as fast as he could get his hands on it
6 when he came back in October of 19 — he's been
7 incarcerated since October of 1995, October 2nd.
8 He was in the isolation unit at the Maine Youth
9 Center until about early June and has been at
10 the York County Jail since then. Because of the
11 nature of the statutes he's not received any
12 credit for time served. So he's been in for
13 what would under the old statute be the
14 equivalent of maybe 18,19 months, he's done that
15 much time and will not be getting credit for
16 that time as a result of what occurs here. The
17 second issue is one of deterrence and I think,
18 again, I think this is a reasonable sentence. I
19 think the amount of time on probation and the
20 underlying amount of time is appropriate.
21 Jeremy has indicated to me and demonstrated to a
22 number of people his commitment to change. I
23 think he's indicated that he feels serious
24 remorse for his crimes. And I would at the
25 bindover hearing the psychologist, Dr. Carbon

42

1 that unit, who is a psychologist and does
2 psychological evaluations, analysis was Jeremy
3 needed to go into the adult system at age 15,
4 that was his treatment plan for Jeremy. Three
5 days later there was a report he needed to go to
6 the Day One long term treatment program and then
7 to Arizona. On February 16th the director of
8 the program says well if he can make it through
9 this program for the next two weeks we're going
10 to put him on a bus to Arizona. Two weeks later
11 have week motivation, is delinquent and he is
12 doing okay in this program but collapses easily
13 and never make it in the community. And that
14 was the day they put him on a bus to Arizona to
15 go back to his family. He was gone for about
16 eight months when he came back. He had lost 30
17 pounds. They had to hospitalize him because of
18 the drug use and the other things that had gone
19 on. They released him twice more. That is the
20 kind of treatment that he received during that
21 five year period and again and again and again
22 they identified substance abuse as an issue and
23 failed to provide even an iota of treatment for
24 that. He has, he was arrested on these
25 charges, he was released on September 1st of

44

1 testified that Jeremy did exhibit remorse and he
2 said it's, he qualified that by about saying
3 it's very difficult for children or anyone who's
4 faced with these kind of serious consequences to
5 have enough emotional stability to exhibit the
6 kind of remorse that you'd want out of someone
7 but that is just the nature of the mind, it's
8 really hard to exhibit remorse when your under
9 the gun and under that kind of pressure. He
10 said what impressed him was Jeremy's ability to
11 connect to people. Jeremy was working with an
12 AA sponsor who came in weekly and was very
13 impressed with Jeremy's commitment to change, in
14 large part because by the time he had been out
15 for a month and had been using those drugs and
16 been out, that far out of control, he came back
17 have ill and really realized that this was not
18 something that he wanted to do, and was really,
19 of course it's too late at that point, but the
20 AA sponsor felt there really was some change
21 here. And the psychologist again found that the
22 people at the Youth Center liked Jeremy, said
23 the basis of remorse is ability to connect with
24 people and Jeremy after all he's been through
25 still has the ability to connect with people.

45

1 Again, I don't think that he is -- the other
2 thing that the psychiatrist said that I think
3 is important is that Jeremy has a motivation to
4 change, that the bad news is that he is
5 depressed, the good news is that that depression
6 motivates him to change. He's not happy with
7 his life, he is not happy with his situation and
8 he says that that is a major factor. Finally
9 would urge the Court to impose the sentence as
10 it's been recommended here and indicate that
11 Jeremy would just like to say a few brief words
12 to the Court.

13 THE COURT: Mr. Bender.

14 THE DEFENDANT: I would just like to say
15 that I am sorry for all the stuff I did and I
16 realize that it was real bad and after I get
17 done with my sentence, doing my time and stuff,
18 that I am going to go to the Day One program and
19 take advantage of that and do that and try to
20 get on with my life after all this stuff.

21 THE COURT: Mr. Bender, I should tell
22 you for the record, because you were not
23 present, that I had a prehearing conference with
24 your attorney and the attorney for the State,
25 and at that time Mr. Chester gave me even more

47

1 on point. It's very appropriate for the crimes.
2 It does not diminish the serious nature of your
3 crimes. It requires you to spend a significant
4 amount of time in jail, and it places you on
5 probation for a very long time because it's
6 going to take you a very long time to get your
7 *life in order and keep it in order. I don't*
8 *want you to underestimate how hard that is going*
9 *to be. When you get out of prison in*
10 *approximately two years from now, depending on*
11 *what occurs in Cumberland County, you are going*
12 *to go into the Day One program, if it is still*
13 *available and if they will accept you. You are*
14 *going to go into whatever other program your*
15 *probation officer requires of you if that is not*
16 *available and that is when the hard part starts.*
17 *Now you know yourself every time you have tried*
18 *in the past something has happened and you*
19 *haven't been able to make it. Now you know that*
20 *you are responsible for saying to the people*
21 *around you I need help and I need it now. And*
22 *you have got to be able to do that when you are*
23 *released from prison. If you don't, I don't*
24 *need to tell you this, you have talked with Mr.*
25 *Chester --*

46

1 information and both of the parties had
2 presented me with the reports from the
3 psychologist. You have an extraordinary history
4 of having substance abuse difficulties and
5 psychological problems that have never been
6 addressed. You have not to this point had the
7 strength on your own to make sure they got
8 addressed, nor has the State done its job to
9 help you with addressing those problems and Mr.
10 Chester I think was kind here today in
11 indicating the ways in which the State has
12 failed you. I don't have any question that this
13 in fact occurred and I think what is happening
14 at the Youth Center these days is itself a major
15 problem, but that is no longer something for you
16 to be looking back to, you need to look forward
17 to what you are going to do in the future.
18 Your attorney convinced me that the sentence
19 that was originally proposed by the State which
20 you were going to have an opportunity to argue
21 again against was slightly harsh, that is that
22 the 14 years underlying your sentence was
23 probably too much under the circumstances and I
24 think the agreement of the State and your
25 attorney and yourself at this point is exactly

48

1 THE DEFENDANT: Right.

2 THE COURT: If you don't the rest of
3 your life will be spent in a jail in some State
4 and coming in and out of a courtroom like this
5 and you will waste an entire lifetime. Can you
6 understand that, Mr. Bender.

7 THE DEFENDANT: Yea.

8 THE COURT: All right. Let me note for
9 the record then that I find that there is
10 clearly a factual basis for the plea that is
11 being entered here today, Mr. Bender has
12 discussed this matter with his attorney, he's
13 given it some thought, he is here today telling
14 me that he wants to waive his rights to have a
15 trial in any of these charges and I am confident
16 that in fact he understands what those rights
17 are. I am also confident that he has knowingly
18 and intelligently given up his rights to have a
19 trial on all these charges and I am confident he
20 now understands the ramifications of this plea,
21 that is he is going to be incarcerated for a
22 period of up to two years, that he is going to
23 have an underlying sentence on the first count
24 of six years, on the second count of four years
25 and concurrent sentences on the other matters.

49

1 More to the point, Mr. Bender understands that
2 he is going to be on probation for a ten-year
3 period. Now one of the things I want to make
4 sure you do understand clearly, Mr. Bender,
5 before we're through here today are the
6 components of your probation because they are
7 what will determine whether or not you are back
8 in jail immediately. You understand that first
9 and foremost you are not going to use alcohol or
10 illegal drugs.

11 THE DEFENDANT: Yes.

12 THE COURT: And it's very simple for me
13 to say and simple for you to agree with but will
14 be the most difficult thing you will ever do, to
15 make sure you don't use drugs or drink at all
16 ever, you are going to submit to a search at the
17 random request of a law enforcement official,
18 that may include a blood, breath or urine test
19 in order to assure you don't have alcohol or
20 drugs near you and you are not using them. And
21 remember you cannot have them near you. If you
22 are with people who have drugs you will be
23 violating your probation. If you are with
24 people who are drinking you will be violating
25 your probation, you understand that?

51

1 have to, do you understand that?

2 THE DEFENDANT: Yes.

3 THE COURT: All right, you are not going
4 to have any contact whatsoever, direct or
5 indirect, with Jameson Sneider or Michael
6 Zelensky. In addition, and I am now making this
7 is a condition of your probation, you obviously
8 know by now you need to stay away from those
9 other people who assisted you in dragging your
10 life right down the tubes, you need to make sure
11 that you don't get near people who are going to
12 pull you away from the programs that you are in
13 and bring you back here and send you back to
14 jail. That is something only you will
15 understand when you get out that you know who to
16 stay away from. I don't need to tell you here
17 today. With regard to restitution, the parties
18 have agreed that restitution up to the amount of
19 ten thousand dollars to the appropriate victims
20 would be paid by the end of the ten year
21 probationary period with understanding that
22 would be payment of approximately a thousand
23 dollars per year. Before I impose that,
24 understanding that Mr. Bender has agreed that he
25 will make that restitution as appropriate, I

50

1 THE DEFENDANT: Yes.

2 THE COURT: It is something you need to
3 stay away from at all costs. You are also going
4 to undergo substance abuse treatment, whatever
5 that treatment is that is recommended by your
6 probation officer. The first treatment you are
7 going to undergo will be the Day One year-long
8 program if they will accept you and if they are
9 still in place when you are released. Given the
10 resource issues we have in this State and other
11 States have that may have changed by the time
12 you are released but make no mistake about it,
13 you are going to go into a treatment program
14 that is residential that your probation officer
15 requires. You are clear on that too?

16 THE DEFENDANT: Yes.

17 THE COURT: All right. In addition, you
18 are also going to get into counseling,
19 psychological or psychiatric counseling as
20 recommended by your probation officer and stay
21 in that counseling and it is not going to clear
22 up your life in a matter of weeks. We're
23 talking about a course of years here. And you
24 must stay in that counseling during the entire
25 time that your probation officer says that you

52

1 need to make sure that he is in fact going to be
2 employable when he is released. The Day One
3 program will allow employment after a certain
4 period of time but I think there are several
5 months without employment. Although a thousand
6 dollars is not an extraordinary amount to pay in
7 the course of a year. Mr. Bender, have you ever
8 been employed for any period of time?

9 THE DEFENDANT: No.

10 THE COURT: Did you complete high school
11 or do you have your GED?

12 THE DEFENDANT: No.

13 THE COURT: How far do you have to go to
14 complete high school, do you know?

15 THE DEFENDANT: I am taking my GED right
16 now.

17 THE COURT: You are working on your GED?

18 THE DEFENDANT: Right.

19 THE COURT: So by the time you are
20 released you anticipate having your GED?

21 THE DEFENDANT: Yes.

22 THE COURT: If there are programs
23 available, likelihood is Windham?

24 MR. MOSKOWITZ: That is my assumption,
25 Your Honor.

53

1 THE COURT: Although that is never
2 altogether clear, does Windham have any
3 continuing education programs left?

4 MR. CHESTER: I don't know, judge.

5 THE COURT: The last I knew they were
6 being limited. I can only recommend, Mr.
7 Bender, that you get into whatever programs they
8 have for continuing education which will make
9 you more employable and make your life better
10 when you are released. Do you have any concerns
11 about your ability to meet this requirement that
12 you are going to pay a thousand dollars per
13 year?

14 THE DEFENDANT: No.

15 THE COURT: All right, with that, then,
16 I will order restitution up to ten thousand
17 dollars, no more than a thousand dollars per
18 year unless required by Probation and Parole, to
19 be paid through the Department of Probation and
20 Parole. Let me also note for the record that
21 the State's representations with regard to the
22 consecutive sentences on Count I and Count II
23 are in agreement with my take on these crimes,
24 in fact the crimes on Count I and II were
25 different episodes, they occurred during the

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1 and obviously began at the initial part of the
2 Hewey analysis and then became a final sentence.
3 It appears to me to be appropriate under the
4 circumstance, in fact the original was a ten
5 year underlying sentence which by itself did not
6 exceed what I think is appropriate under the
7 circumstances, added, however, to the underlying
8 sentence in Count II, together I concluded that
9 that was too much of an underlying sentence,
10 therefore, the six years is perfectly reasonable
11 here. I will accept it. It's clear to me that
12 Mr. Bender has the possibility of rehabilitating
13 himself. It is only a possibility. I don't
14 even know at this point, Mr. Bender, whether
15 it's a probability. You are the only one who
16 knows that, and, therefore, the six-year period
17 of probation is perfectly appropriate and the
18 reduction of the actual time in jail to two
19 years under the circumstances I find also to be
20 reasonable. I think that in fact the two year
21 sentence in jail is a bit light for the charges
22 that are here particularly considering that guns
23 were involved, however, I will note and take
24 into consideration the fact that Mr. Bender has
25 been incarcerated for quite a period of time now

54

1 time that Mr. Bender was on release from a
2 program and the nature of the conduct and Mr.
3 Bender's history certainly indicate that
4 consecutive sentence is, under the
5 circumstances, are appropriate, therefore, I
6 will finally accept the pleas of guilty to each
7 of these nine counts. I will impose the
8 sentences as recommended by the parties, noting
9 for the record that that sentence has been
10 changed as a result of some of my original
11 concerns so the record should reflect those
12 concerns. There is no requirement that I go
13 through a Hewey analysis given that the parties
14 have arrived at this agreement but I think it is
15 important that the Court do at least a brief
16 analysis so that it's clear that this is an
17 appropriate sentence under the circumstances.
18 With regard to Count I, the sentence is a
19 sentence of two years to the Department of
20 Corrections -- I am sorry, six years to the
21 Department of Corrections, all but two years
22 suspended and a period of probation of six years
23 with each of those special conditions that I
24 have previously listed. That six year
25 underlying sentence was arrived at by counsel

56

1 for which he will receive no credit, and,
2 therefore, the two years is determined to be
3 appropriate.

4 With regard to Count II, the sentence
5 will be four years to the Department of
6 Corrections, all suspended and a period of
7 probation of four years to run consecutive to
8 Count I. Again that four year sentence is
9 perfectly appropriate under the circumstances.
10 It's the full suspension of that four years is
11 obviously in order to allow Mr. Bender to begin
12 his rehabilitation process immediately upon
13 completing the two years on Count I. It is
14 appropriate I hope, once again, Mr. Bender, that
15 you take advantage of the services that are
16 provided to you through the Probation and
17 Parole.

18 With regard to Count III, a two
19 year sentence to the Department of Corrections
20 will be imposed. It is a straight sentence,
21 will be concurrent with Count I. I am not going
22 to disturb the recommendations of the parties.
23 This is a Class C criminal offense with a
24 minimum of a year underlying. I am not
25 altogether certain that if I were not

57

1 structuring this sentence on my own I might not
2 have made that a four year sentence under the
3 circumstances. I am not going to disturb it.

4 With regard to Count IV,
5 parties have recommended 12 years, I am sorry,
6 12 months to Department of Corrections, also
7 concurrent with Count I, and I will accept that
8 sentence. Count V is a 364 day sentence to the
9 Department of Corrections, I will also accept
10 that, also concurrent with Count I.

11 Count VI through IX, all
12 misdemeanor charges will have imposed six months
13 concurrent with Count I to the county jail.
14 Obviously the sentence will be served through
15 the Department of Corrections on the major
16 sentences. Conditions of probation have
17 already been laid out, Mr. Bender understands
18 those, accepts them and will comply with them;
19 is that correct, Mr. Bender?

20 THE DEFENDANT: Yes.

21 THE COURT: Mr. Bender, let me tell you
22 one final thing here. It seems to me that Mr.
23 Chester has given you a great deal of
24 assistance. If you were here in court going
25 through trial and convicted of these offenses

59

1 there would be a hundred twenty five, plus
2 forty, one sixty five, Mr. Bender, do you have
3 any money in your jail account?

4 THE DEFENDANT: Yes.

5 THE COURT: How much?

6 THE DEFENDANT: Twenty dollars.

7 THE COURT: State have any objection to
8 my waiving the victim sur charges?

9 MR. MOSKOWITZ: No, Your Honor.

10 THE COURT: When you are released from
11 jail you need to be attending to restitution
12 right away. And I am going to waive the victim
13 sur charges on each of the separate nine counts
14 here. Is there anything further from counsel
15 this morning?

16 MR. CHESTER: Your Honor, I want to be
17 clear. I think you said that he was to pay
18 that, the restitution, the ten thousand dollars
19 at a thousand dollars a year or more as directed
20 by Probation and Parole?

21 THE COURT: Yes.

22 MR. CHESTER: I am a little concerned
23 about the first year. I was -- I would ask the
24 Court to except the first year, assuming that he
25 does get into a program like Day One, I suspect

58

1 you would certainly be looking at a much longer
2 initial time in jail; do you understand that,
3 Mr. Bender?

4 THE DEFENDANT: Yes.

5 THE COURT: I want to make sure that you
6 do because I know you have spent much of your
7 time in the juvenile system and those sentences
8 are indeterminate and been released on a regular
9 basis when it's perhaps you shouldn't have been.
10 If you are back in the adult system again on
11 these kinds of charges you are going to spend
12 most of your young adult life in jail. And I
13 don't think there's much question about that. I
14 just want you to keep that in mind as you begin
15 the process of moving onward with your life.

16 You have a right to appeal the
17 sentences I have just imposed. You need to
18 review that right with your attorney. You are
19 about to be given a document, please go through
20 that with Mr. Chester and make sure you
21 understand it in full. You want to understand
22 that also in the context of whatever is
23 happening in Cumberland County, and I am sure
24 Mr. Chester will assist you with that, with
25 regard to the victim fund sur charges of which

60

1 that he will not be allowed off the campus for a
2 significant period of time.

3 THE COURT: I think you are right.

4 MR. CHESTER: And so if we could exempt
5 that year, first year he would still have nine
6 years to catch up and I don't think that would
7 be unreasonable to expect him to make that up.

8 THE COURT: I assume the State has no
9 objection?

10 MR. MOSKOWITZ: No, that sounds
11 reasonable, Your Honor.

12 THE COURT: And I am going to include
13 then in the restitution requirement that the one
14 thousand or more per year does not apply to year
15 one so long as Mr. Bender is in fact residing in
16 the program. The minute he leaves that program
17 he has got a probation violation issue all on
18 its own but if he is no longer in a residential
19 program that is limiting his ability to be
20 employed then certainly he should be out there
21 working and getting the restitution paid.

22 MR. CHESTER: Thank you.

23 THE COURT: You understand what I am
24 saying, Mr. Bender?

25 THE DEFENDANT: Yes.

61

62

1 THE COURT: If you are in that program
2 during that first year you do not need to
3 concentrate on restitution during that first
4 year, concentrate on staying clean and sober,
5 getting a education. And anything further?

6 MR. MOSKOWITZ: No.
7 (Whereupon, the sentencing was concluded.)

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REPORTER'S CERTIFICATE

I hereby certify that the foregoing is a
correct transcription of my stenographic notes
of the testimony and proceedings at the trial of
the above-mentioned cause.

Dated this 15th day of December, 1999.

Kathleen S. Casey
Kathleen S. Casey, CSR, RPR

A TRUE COPY ATTEST

Dianne Shie
CLERK

STATE OF MAINE
SUPERIOR COURT

JUDGMENT AND COMMITMENT

Docket No. CR96-1972	County Cumberland	D. 11/1/96	DOB 03/02/79
State of Maine v. Defendant's Name Jeremy Bender		Residence	
Offense(s) charged: #1, Burglary—Class B #2, Theft—Class C #3, Burglary—Class A #4, Theft—Class E		Charged by: <input type="checkbox"/> indictment <input checked="" type="checkbox"/> information <input type="checkbox"/> complaint	
Plea(s): <u>Guilty</u>			
Offense(s) convicted: #1, Burglary—Class B #2, Theft—Class C #3, Burglary—Class A #4, Theft—Class E		Convicted on: <input checked="" type="checkbox"/> plea of guilty <input type="checkbox"/> plea of nolo <input type="checkbox"/> jury verdict <input type="checkbox"/> court finding	

IT IS ADJUDGED THAT THE DEFENDANT IS GUILTY OF THE OFFENSES AS SHOWN ABOVE AND CONVICTED.

☒ IT IS ADJUDGED THAT THE DEFENDANT BE HEREBY COMMITTED TO THE SHERIFF OF THE WITHIN NAMED COUNTY OR HIS AUTHORIZED REPRESENTATIVE WHO SHALL WITHOUT NEEDLESS DELAY REMOVE THE DEFENDANT TO:

☒ The custody of the Commissioner of the Department of Corrections, at a facility designated by the Commissioner, to be punished by imprisonment for a term of 6 mos. as to cc. 3 - concurrent w/ York Cty. 96-1066; 4 mos. as to cc. 1 + 2 each

☒ The County jail to be punished by imprisonment for a term of 6 months as to cc. 3
concurrent w/ cc. 3, but no credit to cc. 1 + 2

#1-2 ☒ This sentence to be served consecutive to Counts 3 + 4 PAF

☐ Execution stayed to on or before: _____ at _____ (a.m.) (p.m.)

☒ IT IS ORDERED THAT ALL (BUT) as to cc. 3: 2 1/2 yrs. OF THE FOREGOING SENTENCE BE SUSPENDED AND THE DEFENDANT BE COMMITTED TO THE CUSTODY AND CONTROL OF THE DIVISION OF PROBATION AND PAROLE FOR A TERM OF 6 mos. as to cc. 3 - 4 yrs.
concurrent w/ cc. 1 + 2 UPON CONDITIONS ATTACHED HERETO AND INCORPORATED BY REFERENCE HEREIN. SAID PROBATION TO COMMENCE (_____) (UPON COMPLETION OF THE UNSUSPENDED TERM OF IMPRISONMENT). THE DEFENDANT SHALL SERVE THE INITIAL PORTION OF THE FOREGOING SENTENCE AT _____

☐ The final _____ month(s) of the unsuspended portion of the term of imprisonment is to be served with intensive supervision under conditions separately specified and incorporated herein.

☐ IT IS ORDERED PURSUANT TO APPLICABLE STATUTES, THAT THE DEFENDANT'S MOTOR VEHICLE OPERATOR'S LICENSE OR PERMIT TO OPERATE, RIGHT TO OPERATE A MOTOR VEHICLE AND RIGHT TO APPLY FOR AND OBTAIN A LICENSE IS SUSPENDED FOR A PERIOD OF _____

☐ IT IS FURTHER ORDERED THAT THE DEFENDANT'S RIGHT TO REGISTER A MOTOR VEHICLE IS SUSPENDED AND THE REGISTRATION PLATES ISSUED TO THE DEFENDANT BY THE STATE ARE SUSPENDED.

☐ Suspension effective beginning _____ at _____ (a.m.) (p.m.)

☐ Suspension effective beginning after release from incarceration. (17-A MRSA §1103, sub-§ _____)

<input type="checkbox"/>	IT IS ORDERED THAT THE DEFENDANT FORFEIT AND PAY THE SUM OF _____ DOLLARS, AS A FINE, PLUS A 10% SURCHARGE, TO THE CLERK OF THE COURT. (4 M.R.S.A. § 1057)
<input type="checkbox"/>	IT IS FURTHER ORDERED THAT THE DEFENDANT PAY AN ADDITIONAL: <input type="checkbox"/> \$30.00 <input type="checkbox"/> \$125.00 SURCHARGE TO THE CLERK OF THE COURT. (29 M.R.S.A. § 1312-B(5), 29-A M.R.S.A. § 2411 (7))
<input checked="" type="checkbox"/>	IT IS FURTHER ORDERED THAT THE DEFENDANT PAY AN ASSESSMENT OF \$10.00 FOR EACH CLASS D AND E CONVICTION AND \$25.00 FOR EACH MURDER AND CLASS A, B, AND C CONVICTION FOR A TOTAL OF <u>\$85.15</u> TO THE CLERK OF THE COURT FOR THE VICTIMS' COMPENSATION FUND. (5 M.R.S.A. § 3360-I) \$_____ OF THE ASSESSMENT HAS BEEN PAID. <input type="checkbox"/> All but _____ suspended. <input checked="" type="checkbox"/> Execution/payment stayed to pay in full by <u>4 in first 18 mths</u> or warrant to issue. <input type="checkbox"/> To pay \$_____ per week / month beginning <u>probation</u> or warrant to issue.
<input type="checkbox"/>	IT IS ORDERED THAT EXECUTION OF THE FOREGOING SENTENCE AS IT RELATES TO THE FINE BE SUSPENDED AND THE DEFENDANT BE COMMITTED TO THE CUSTODY AND CONTROL OF THE DIVISION OF PROBATION AND PAROLE FOR A TERM OF _____ UPON CONDITIONS ATTACHED HERETO AND INCORPORATED BY REFERENCE HEREIN.
<input type="checkbox"/>	IT IS ORDERED THAT THE DEFENDANT PERFORM _____ HOURS OF COMMUNITY SERVICE WORK WITHIN _____ (WEEKS) (MONTHS) FOR THE BENEFIT OF _____
<input checked="" type="checkbox"/>	IT IS ORDERED THAT THE DEFENDANT FORFEIT AND PAY THE SUM OF <u>\$10,000.-</u> DOLLARS AS RESTITUTION, THROUGH THE (DIVISION OF PROBATION AND PAROLE) (DISTRICT ATTORNEY'S OFFICE) FOR THE BENEFIT OF <u>victims</u> (17-A M.R.S.A. § 1152-2-A) <input checked="" type="checkbox"/> Execution/payment stayed to pay in full by <u>at rate of \$1,000.- per year</u> or warrant to issue.
<input type="checkbox"/>	IT IS ORDERED THAT THE DEFENDANT PAY _____ FOR EACH DAY SERVED IN THE COUNTY JAIL, TO THE TREASURER OF THE ABOVE NAMED COUNTY. (17-A M.R.S.A. § 1341) <input type="checkbox"/> Execution/payment stayed to pay in full by _____ or warrant to issue.
<input type="checkbox"/>	IT IS ORDERED THAT THE DEFENDANT SHALL PARTICIPATE IN ALCOHOL AND OTHER DRUG EDUCATION, EVALUATION AND TREATMENT PROGRAMS FOR MULTIPLE OFFENDERS ADMINISTERED BY THE DEPARTMENT OF HUMAN SERVICES. (29 M.R.S.A. § 1312-B (2)(D-1), 29-A M.R.S.A. § 2411 (5)(E))
<input type="checkbox"/>	IT IS ORDERED THAT THE DEFENDANT FORFEIT TO THE STATE THE FIREARM USED BY THE DEFENDANT DURING THE COMMISSION OF THE OFFENSE(S) SHOWN ABOVE. (17-A M.R.S.A. § 1158)
<input type="checkbox"/>	IT IS ORDERED THAT THE DEFENDANT BE UNCONDITIONALLY DISCHARGED. (17-A M.R.S.A. § 1201)
IT IS FURTHER ORDERED THAT THE CLERK DELIVER A CERTIFIED COPY OF THIS JUDGMENT AND COMMITMENT TO THE SHERIFF OF THE ABOVE NAMED COUNTY OR HIS AUTHORIZED REPRESENTATIVE AND THAT THE COPY SERVE AS THE COMMITMENT OF THE DEFENDANT. REASONS FOR IMPOSING CONSECUTIVE SENTENCES ARE CONTAINED IN THE COURT RECORD OR IN ATTACHMENTS HERETO.	
A TRUE COPY, ATTEST: _____ Clerk, Superior Court <u>Paula Embick</u> Justice, Superior Court	
I understand the sentence imposed herein and acknowledge receipt of a copy of this JUDGMENT AND COMMITMENT. Dated: <u>November 1, 1996</u> <u>Jeremy A. Barker</u> Defendant	
RETURN By virtue of the within JUDGMENT AND COMMITMENT I have this day delivered the within-named Defendant to the _____ Dated: _____ Deputy Sheriff By virtue of this warrant, the within-named Defendant has been removed to and received at the _____ _____ on this day. Dated: _____ Authoriz _____ Officer/Supt., M.C.C./Warden M.S.P.	

STATE OF MAINE
CUMBERLAND, SS.
Docket No. CR-96-1972✓

SUPERIOR COURT
CRIMINAL ACTION

STATE OF MAINE

v.

JEREMY BENDER

BEFORE:

The Honorable Paul A. Fritzsche, Justice of the
Superior Court, in Portland, Maine, on Friday,
November 1, 1996.

APPEARANCES:

Howard F. O'Brien, Esq.
For the State

Edwin P. Chester, Esq.
For the Defendant

A True Copy
Attest: *Jolly A. Bump*
Clerk of Courts

OFFICIAL TRANSCRIPT
Prepared by the Electronic Recording Division

ORIGINAL

INDEX OF WITNESSES

WITNESSES

DIRECT

CROSS

REDIRECT

RECROSS

No Witnesses

INDEX OF EXHIBITS

EXHIBITS

MARKED

OFFERED

ADMITTED

No Exhibits

1 (This matter came on for hearing before The Honorable
2 Paul A. Fritzsche, Justice of the Superior Court, at the
3 Cumberland County Courthouse, Portland, Maine, on Friday,
4 November 1, 1996.)

5 COURT: Mr. Jeremy Bender with Mr. Chester. This is
6 Docket Number 96-1972. Is this going to be a plea to all
7 charges?

8 EDWIN P. CHESTER, ESQ.: Yes, Judge.

9 COURT: Would you give this to Mr. Chester and -- we
10 won't have anybody sign it quite yet. There's some things I
11 need to go over first. Mr. Bender, the State would like to
12 bring four charges against you in what's called an
13 information. I would like to first tell you what those
14 charges are and then talk to you about the difference between
15 informations and indictments. The first charge, and you can
16 follow along with Mr. Chester, is a charge of burglary. It's
17 a Class B charge that's claimed to have occurred on September
18 21st, 1995, at the home of the Flannerys [sic] in Westbrook.
19 Are you aware the State would like to bring that charge
20 against you?

21 JEREMY BENDER, DEFENDANT: Yes.

22 COURT: Do you know it has a maximum possible sentence,
23 by law, of ten years?

24 MR. BENDER: Yes.

25 COURT: The second charge they'd like to bring against

1 you is called a Class C theft charge. That's a claim that on
2 September 21st, 1995, also in Westbrook, you stole property
3 from the Flannerys, being jewelry, and the value was more than
4 two thousand dollars. Are you aware of that charge and it's
5 maximum possible sentence of five years?

6 MR. BENDER: Yes.

7 COURT: Now the third charge they'd like to bring against
8 you is a charge of Class A burglary. It's a claim that on
9 September 28th, 1995, in Pownal, you committed a burglary at
10 the home of Susan and William Martins [sic] and at that time
11 you were armed with a firearm. Are you aware that that charge
12 would like to be brought, and that has a possible maximum
13 sentence of twenty years?

14 MR. BENDER: Yes.

15 COURT: Then the last charge they'd like to bring against
16 you is one of theft, Class E, of checks and money of a value
17 of less than a thousand dollars from the Martins in Pownal.
18 Are you aware they'd like to bring that charge as well?

19 MR. BENDER: Yes.

20 COURT: Now, the normal procedure, in order for the State
21 to bring the two burglary and the Class C theft charge, is to
22 go before a body called the Grand Jury. A Grand Jury consists
23 of thirteen to as many as twenty-three people from throughout
24 all of Cumberland County who will meet privately here in the
25 courthouse and will hear the State's side of the case. They

1 can decide that there's enough evidence to charge you or they
2 can say to the State, "You don't have enough evidence, we
3 aren't going to charge Mr. Bender." So the normal process for
4 these -- the more serious charges in the first three counts is
5 to go before this Grand Jury and see if the Grand Jury will
6 indict you -- or charge you. You have the right, if you wish,
7 to say, "I don't care about that, I'm willing to skip that or
8 waive that," and proceed instead on what's called an
9 information. What an information is, it's simply charges that
10 are brought on the signature of a prosecutor as opposed to the
11 vote of a Grand Jury. No one can take away your right to have
12 a Grand Jury indictment or to insist that they go before a
13 Grand Jury. You can give up that right if you want, but you
14 cannot be forced to do that. Do you have any questions about
15 informations or indictments?

16 MR. BENDER: No.

17 COURT: If it's your desire to give up your right to
18 indictment and proceed on an information, you can sign the
19 paper that's on the lectern in front of you.

20 MR. CHESTER: Your Honor, for the record, this young man
21 was bound over yesterday. One of the reasons for proceeding
22 by information is that if he were to be detained without
23 having -- and await the Grand Jury indictment, he would not be
24 getting any credit for the time that he's serving in Windham
25 on a separate charge, and so that is one of the major reasons

1 for proceeding this way today.

2 COURT: The petition and waiver have been approved. I
3 find that Mr. Bender is aware of the nature of the charge and
4 his rights concerning indictments and informations, and that
5 he's made a knowing, voluntary and intelligent waiver after
6 discussing the matter with counsel. Mr. Bender, now getting
7 to the merits of the charges, have you had a chance to discuss
8 the details of the charges fully with your attorney?

9 MR. BENDER: Yes.

10 COURT: Is there anything you still want to ask him about
11 or anything you'd still like him to do?

12 MR. BENDER: No.

13 COURT: Do you have any disagreement with how he's
14 handled your case?

15 MR. BENDER: No.

16 COURT: Do you know that if you plead guilty to the
17 charges there's not going to be a trial?

18 MR. BENDER: Yes.

19 COURT: You know that if you went to trial, your trial
20 would be reasonably soon, you'd have the right to a public
21 trial and your trial could either be with a jury or just with
22 a judge. So you know you have those rights concerning a trial
23 which will be given up if you plead guilty?

24 MR. BENDER: Yes.

25 COURT: Now, there's a number of rights and protections

1 that would normally be part of a trial and those will be gone
2 if you plead guilty. They include the following: First, if
3 you had a trial the witnesses against you have to come into
4 court and testify and your attorney can thoroughly question
5 them to make sure they've got their story correct and what
6 they're telling is accurate -- to see if there's any
7 weaknesses in what they have to say. Secondly, if you knew of
8 any people by information was related to the charges and
9 helpful to your side, you could have those people be witnesses
10 for you.[sic] In other words, you can present witnesses in
11 your defense, if you want, at a trial. Third, your attorney
12 would give you his best advice, but then you'd make up your
13 mind as to whether you wanted to testify personally and tell
14 your side in your own words, or remain silent and say nothing
15 at all. If you decided at a trial that you did not want to
16 testify, that's fine and that's not to be held or used against
17 you. Either decision is one that's legally acceptable. The
18 last right you give up is if you had gone to trial you would
19 start the trial with what's called a presumption of innocence.
20 That means when you begin, you're not guilty and you stay not
21 guilty unless the State can present enough -- strong enough
22 evidence to prove your guilt by proof beyond a reasonable
23 doubt. So that means that the State has to prove the charge
24 against you, you don't have to prove your innocence. So, do
25 you know that all of those rights are gone if you decide to

1 plead guilty?

2 MR. BENDER: Yes.

3 COURT: Other than your plea bargain, has anybody
4 promised you anything to get you to plead guilty?

5 MR. BENDER: No.

6 COURT: Have you been forced or threatened to get you to
7 plead guilty?

8 MR. BENDER: No.

9 COURT: If you do plead guilty it will be of your own
10 free will and free choice.

11 MR. BENDER: Yes.

12 COURT: Now, on the burglary charge, the one involving
13 the Flannerys in Westbrook, the State has to prove three
14 things. First, that you went into their house, you had no
15 permission or right to do so, and you went in with the thought
16 of stealing something. So do you know that that's what's
17 meant by a Class B burglary?

18 MR. BENDER: Yes.

19 COURT: Count II, the theft charge -- very
20 straightforward -- they have to prove that you took jewelry
21 from their house and the value of the jewelry was more than
22 two thousand dollars and you took it with the intention -- the
23 thought of depriving them of their property. You weren't just
24 borrowing it, you were planning on keeping it for -- well,
25 permanently or selling it or in some way getting rid of it in

1 a way that it wouldn't go back to them. So you know that's
2 what's meant by the theft charge?

3 MR. BENDER: Yes.

4 COURT: And lastly, on the Class A burglary, the State
5 has to prove all the things for a normal burglary; that you
6 went into the Martins' house in Pownal, you had no permission
7 to do so, and you had the intention of stealing something.
8 Then they also have to prove that at the time you went into
9 the house you were armed with a firearm. It's not saying that
10 you used it or you hurt anybody, but you had a gun of some
11 nature with you at the time of the burglary. So you know that
12 that's what's meant by that charge?

13 MR. BENDER: Yes.

14 COURT: Ms. Pope? [sic]

15 MS. POPE: I'm sorry, this is Mr. O'Brien's --

16 COURT: Oh, not you, Mr. O'Brien? That's the danger of
17 standing up.

18 MS. POPE: Yes, Your Honor.

19 COURT: Mr. O'Brien.

20 HOWARD F. O'BRIEN, ESQ.: Thank you, Your Honor. If this
21 were to proceed to trial we'd present the testimony of Maria
22 Flannery, who would testify that on September 21st, 1995 she
23 left her house at about 5:25 p.m., returned at about 5:50 to
24 find that the side door had been kicked in, the house was
25 ransacked and her bedridden mother was very upset. She

1 discovered that over ten thousand dollars in jewelry was
2 missing. She also I.D.'d some of the jewelry later when it
3 was recovered. We'd also present the testimony of Angelina
4 Ranieri, [sic] who is the mother in this case. She was home
5 during the burglary. Two men came in; one black, one white.
6 The white male stood by her bed while the black male went
7 upstairs and then her daughter returned. We'd present the
8 testimony of Richard Finnerty, a neighbor, who said that about
9 5:15 two men in a small grey car pulled into his driveway to
10 inquire about a car he had for sale and he I.D.'d the black
11 male, Jamison Snyder [sic], later. Two other neighbors,
12 Ronald Reed and Leslie Nichols [sic], saw the same dark
13 colored car with temporary plates in the neighborhood at this
14 time. John Searles, [sic] from Westbrook, would testify that
15 he sold that car to Jamison Snyder just five days before that.
16 We'd also present the testimony of Sandra Gray [sic] of -- in
17 Biddeford, who said that about eleven o'clock on that same
18 night, that that car was parked in her driveway, a black male
19 ran away from it, police got a warrant, searched the car and
20 found some of the jewelry and other things inside the car. On
21 the 28th of September -- we'd present the testimony of Susan
22 Martins, who'd testify that on the 28th she was in her home in
23 Pownal and found a black male standing in her kitchen smoking
24 a cigarette, a white male came up behind her and the black
25 male stole some checks and a small amount of cash out of her

1 pocketbook. We'd present the testimony of Robert Payzant
2 [sic], a taxi driver in Freeport, who would testify that the
3 defendant in this case got into his cab and went a short
4 distance and then left and Mr. Payzant later found a loaded
5 handgun in the back of the taxi. This was also on the evening
6 of the 28th. Sometime later, Trooper Lowell Smith received a
7 call to go to the Maine Youth Center, spoke to the defendant
8 at the Maine Youth Center and he made a full confession to
9 both burglaries.

10 COURT: Mr. Chester, any comments upon the State's
11 claims?

12 MR. CHESTER: No, Judge.

13 COURT: Mr. Bender, anything you'd like to say before you
14 enter your pleas?

15 MR. BENDER: No.

16 COURT: Count I, the charge of Class B burglary at the
17 Flannery house in Westbrook, how do you plead?

18 MR. BENDER: Guilty.

19 COURT: Count II, the charge of Class C theft from them,
20 how do you plead?

21 MR. BENDER: Guilty

22 COURT: Count III, the charge of Class A burglary at the
23 Martins' house in Pownal, how do you plead?

24 MR. BENDER: Guilty.

25 COURT: And Count IV, the charge of Class E theft from

1 the Martins, how do you plead?

2 MR. BENDER: Guilty.

3 COURT: The pleas will be accepted, they're knowing
4 pleas, they're voluntarily entered, they're made after
5 sufficient discussion with competent defense counsel, and the
6 State has sufficient evidence that, if believed, would
7 establish the elements of all the offenses. Mr. O'Brien, the
8 recommendation, please?

9 MR. O'BRIEN: Yes, Your Honor, this recommendation
10 mirrors a plea that was taken in York County a short time ago.
11 It's a little backwards, but under Count III, the
12 recommendation is six years' Department of Corrections, all
13 but two and a half suspended, with six years probation, and as
14 far as the Count IV, the E theft -- that should be a
15 concurrent six months. There should be the same probation
16 conditions as in York County and I can outline those for you,
17 if you'd like.

18 COURT: Please.

19 MR. O'BRIEN: To reside in and obtain treatment at the
20 Day One program or its equivalent during the first year of his
21 probation; submit to substance abuse treatment and counselling
22 to the satisfaction of Probation and Parole; not to possess or
23 consume any alcohol or illegal drugs; submit to random testing
24 of his person, place or residence and motor vehicle for
25 alcohol and illegal drugs; to engage in psychological

1 counselling and treatment to the satisfaction of Probation and
2 Parole; to have no contact, direct or indirect, with Jamison
3 Snyder or Michael Zelinski, that's Z-E-L-I-N-S-K-I; and to pay
4 restitution of up to ten thousand dollars during the period of
5 his probation, to be paid at the rate of one thousand dollars
6 per year. On Count I, the Class B burglary, the sentence is
7 to be four years Department of Corrections, all suspended,
8 with four years' probation. That's to run consecutive to
9 Counts III and IV, but also concurrent with another docket
10 number in York County, and I'm sure Mr. Chester can give you
11 both of the docket numbers --

12 MR. CHESTER: That's 96-1066.

13 COURT: Thank you. And Count II -- go ahead --

14 MR. O'BRIEN: And under Count II, the Class B -- C theft,
15 it would be a concurrent four years, all suspended, with four
16 years' probation. And it would be the same bail conditions --
17 probation conditions, with the exception of the restitution on
18 these two counts.

19 COURT: Why wouldn't -- I understand that you wish to
20 have him have ten years of probation?

21 MR. O'BRIEN: Oh, that's right, I'm sorry. The
22 restitution should run on the second count as well.

23 COURT: Mr. Chester, is that the plea agreement?

24 MR. CHESTER: Yes, Judge.

25 COURT: So, does this add any new time, or is this the

1 same amount of time he's already received?

2 MR. CHESTER: It actually adds six months. It was two
3 years in York County.

4 COURT: That seems appropriate -- that there be some more
5 time 'cause there's been some more crimes. Mr. Bender, is this
6 what you've agreed to?

7 MR. BENDER: Yes.

8 COURT: You're how old now?

9 MR. BENDER: Eighteen.

10 COURT: Did you drop out of school?

11 MR. BENDER: Yes.

12 COURT: How far did you go?

13 MR. BENDER: Eighth or ninth grade.

14 COURT: Okay. You ever had a real job of any kind?

15 MR. BENDER: No.

16 MR. CHESTER: Your Honor, if I may, this young man --
17 *this is one of the most tragic and outrageous cases I've ever*
18 *handled. Jeremy came into the Maine Youth Center in 1991 on a*
19 *criminal trespass and was there for five years, and the only*
20 *evaluation they ever did indicated that he needed substance*
21 *abuse treatment. In the five years he was there he never*
22 *received any substance abuse treatment, even though they have*
23 *-- in fact, one of the most effective programs is a substance*
24 *abuse treatment cottage. He was released from the Youth*
25 *Center on three occasions, and as best the records indicate*

1 they knew they were sending him out as an untreated addict,
2 and they sent him out to situations where they knew he was
3 going to fail. And when they brought him back, they
4 recognized that he had failed in large part because of his
5 substance abuse problem, and yet they sent him out again and
6 again. The final release was in August of '95, and he was
7 sent to Tennessee to live with his family once again. He'd
8 been released to them each of the prior times and it had just
9 disastrous results -- gotten worse, more dependent, more
10 problems each time. His mother didn't even have a phone --
11 but they put him on a bus and what happened was he got to
12 Boston and ran into a friend of his and he didn't continue on
13 to Tennessee, his friend and he went to Lawrence, Mass., they
14 obtained crack cocaine, and for about a month Jeremy and his
15 friend were, basically, smoking crack cocaine and ingesting
16 various other drugs. Jeremy takes some credit for that, and I
17 think that's appropriate. On the other hand, this is a young
18 man, again, who went into the Youth Center on a simple
19 criminal mischief back in 1991, and we had a three-day hearing
20 in Biddeford District Court on the bindover, and I think it
21 was a very difficult decision, but Judge Levy did bind him
22 over. The psychologist -- my psychologist testified that
23 crack cocaine is one of the most disinhibiting substances
24 known to man, and I guess, you know, without diminishing
25 Jeremy's responsibility and -- for these offenses, and without

1 diminishing the injuries suffered by the victims -- nobody was
2 hurt, Jeremy never hurt anybody. He certainly threatened, he
3 committed a number of burglaries and thefts, but to his
4 credit, under very stressful circumstances, when he was under
5 the influence of very powerful drugs, nobody ever got hurt.
6 This sentence is designed, I think, to recognize and reflect,
7 perhaps, some of the State's failure to take responsibility
8 for its role in this young man's situation. We're hopeful
9 that he'll be out at a young enough age so that he can go to
10 the Day One program, which is a year-long substance abuse
11 treatment program, and it's hoped that that -- this long
12 period of probation may provide enough stability in his life
13 so that he can begin to turn things around.

14 COURT: I sure hope so. On Count III, the sentence will
15 be six years to the Department of Corrections, all but two and
16 a half years suspended with six years of probation. That will
17 be concurrent with Count IV and -- that should probably also
18 be concurrent with the York County case --

19 MR. CHESTER: Yes.

20 COURT: -- and concurrent with York County case 96-1066.
21 On Counts I and II, since they're separate incidents, a
22 consecutive sentence will be imposed. I and II will be
23 consecutive to III and IV, but concurrent with each other. On
24 each of I and II there will be sentences of four years to the
25 Department of Corrections, all suspended, four years of

1 probation. There will be victim compensation surcharges that
2 total eighty-five dollars, payable in the first eighteen
3 months of probation. The probation conditions will include --
4 and this may be the most important one initially -- is that
5 during the first year of probation he reside at the Day One
6 program in the proper facility designated by them, and if Day
7 One no longer exists then the best equivalent program that
8 exists a year or so from now. He'll also receive substance
9 abuse counselling and treatment; psychological counselling
10 treatment; the requirements of no use of alcohol or any drugs;
11 he can be searched and tested to make sure he's drug and
12 alcohol free; they can search his residence, any vehicle he
13 has and his person. I may have mentioned the victim
14 compensation surcharges were eighty-five dollars total. That
15 was within eighteen months. It lets him get the whole Day One
16 program behind him before that burden is placed upon him. And
17 then because there is substantial hope that if we can find a
18 way to keep him drug and alcohol free that he's still young
19 enough and able-bodied, the assumption is that because of that
20 and because he has no dependents that I know of or that
21 anybody's mentioned, he'd be able to pay restitution. That
22 will be in an amount not to exceed ten thousand dollars, at a
23 rate of a thousand dollars per year; that comes to roughly
24 twenty dollars a week, or about fifty cents an hour from a
25 paycheck. He'll have the right to appeal those sentences to

1 the Maine Supreme Court, if he wants to, and the reason for
2 the longer sentence in Count III is the presence of the
3 firearm. The majority of the sentence on all the counts has
4 been suspended because, again, he's still young and we're
5 hopeful that with a lot of work on his part and some help
6 through substance abuse treatment things can still get turned
7 around. We also have an additional probation condition of no
8 contact with Mr. Jamison Snyder or Mr. Michael Zelinski. I
9 don't know Mr. Zelinski, but I met Mr. Snyder on numerous
10 occasions. He lived in the Sanford area when I first met him,
11 and he's been in a lot of trouble and it's probably best for
12 Mr. Bender that they not get back together again.

13 (INDEX NUMBERS 2056 - 3701 NOT TRANSCRIBED, UNRELATED
14 MATTERS HEARD)

15 COURT: Mr. Chester?

16 MR. CHESTER: Yes, Your Honor. With regard to the Bender
17 matter, in York County the requirement that he pay restitution
18 at the rate of a thousand dollars per year was suspended for
19 the first year, in the expectation that he would be unable to
20 (INAUDIBLE).

21 COURT: Some programs you work and earn money, others you
22 don't; but I'll add that no restitution is required during the
23 first year of probation.

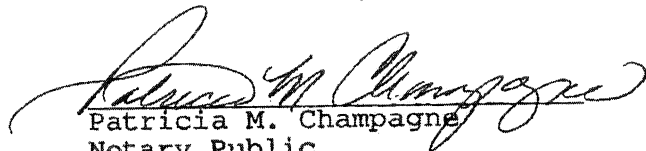
24 MR. CHESTER: Thank you.

25 END OF HEARING.

CERTIFICATION

I HEREBY CERTIFY that the foregoing, pages 3 through 18, is a true transcript of Tape Number 1350, Index Numbers 520 - 2055 and 3702 - 3780, recorded on Friday, November 1, 1996, by Joanne Hebert, at the Maine Superior Court located at Portland, Maine, of the case entitled STATE OF MAINE v. JEREMY BENDER.

Dated: June 11, 1999


Patricia M. Champagne
Notary Public